

(22,308)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 129.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES
GUTIERREZ DEL ARROYO, AND FRANCISCO ROBLEDO,
APPELLANTS,

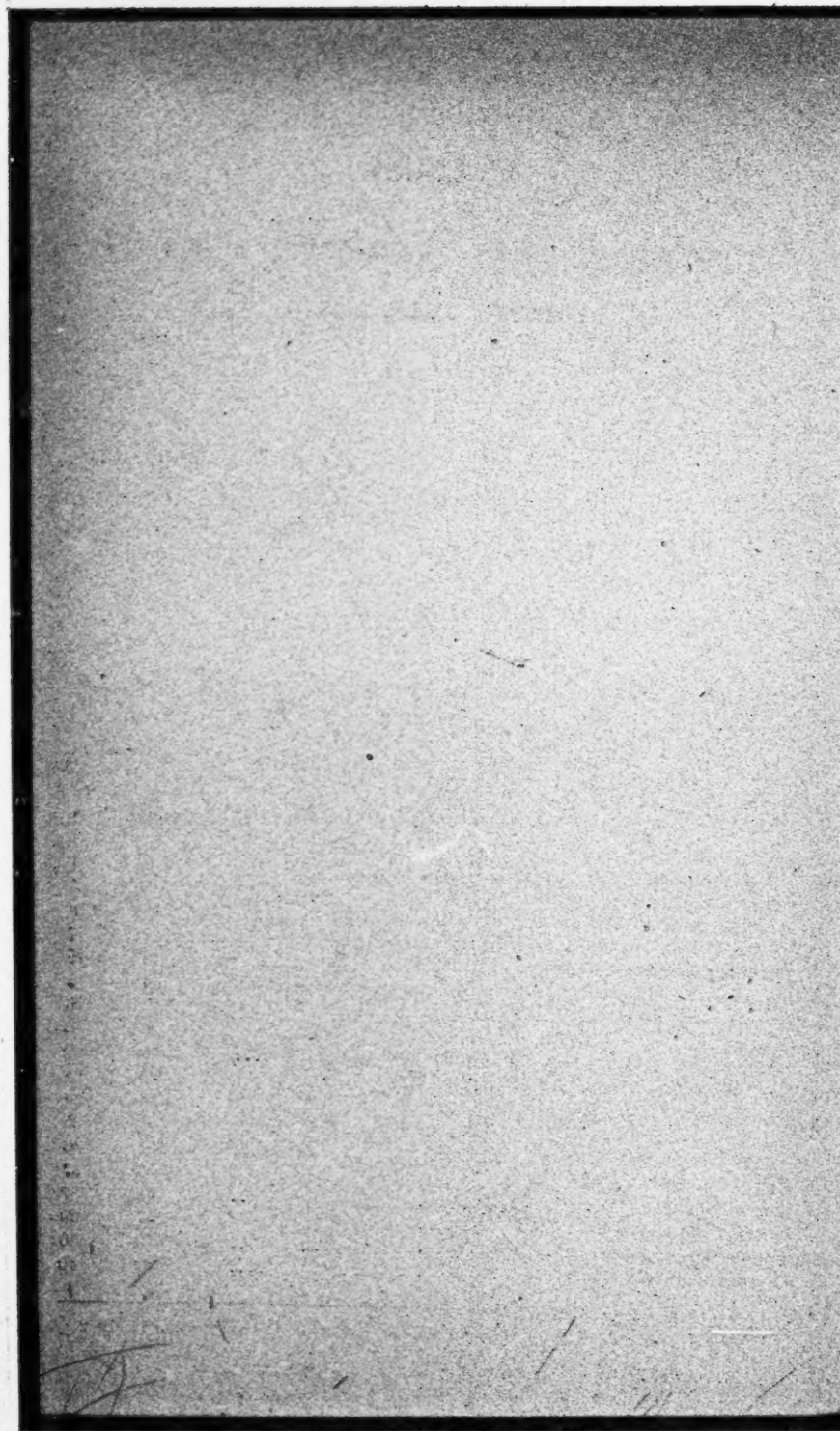
vs.

ROBERT GRAHAM.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
PORTO RICO.

INDEX.

	Original.	Print
Caption	1	1
Bill of complaint	2	1
Subpoena in chancery	9	5
Marshal's return	11	0
Answer of Gutierrez del Arroyo, Rafael and Dolores	12	7
Answer of Francisco Robledo	19	12
Journal entry, February 23, 1910: Bill amended and cause submitted	24	15
Journal entry, May 7, 1910: Opinion filed	25	16
Opinion	26	16
Journal entry, May 17, 1910: Findings of fact approved	27	22
Findings of fact	36	22
Final decree	44	21
Petition for appeal	50	25
Assignment of errors	51	26
Order allowing appeal	53	27
Appeal bond	54	27
Citation and service	57	29
Precept for record	59	40
Certificate of clerk	60	40



1 THE UNITED STATES OF AMERICA,
District of Porto Rico, ss:

At a Stated Term of the District Court of the United States for Porto Rico, within and for the District Aforesaid, Begun and Held at the Court Rooms of said Court in the City of San Juan, on the Second Monday of April, Being the Eleventh Day of that Month, in the Year of Our Lord One Thousand Nine Hundred and Ten, and of the Independence of the United States of America the One Hundred and Thirty-fourth.

Present: The Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico.

Among other were the following proceedings, to wit:

2 *Bill of Complaint.*

(Filed October 18, 1909, and as Amended February 23, 1910.)

In the United States District Court for Porto Rico.

In Equity. No. 672.

ROBERT GRAHAM, Complainant,
vs.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLEDO, Defendants.

The complainant, Robert Graham, by his solicitors, Sweet & Wilcox, brings this his bill of complaint against the above named defendants Rafael Gutierrez del Arroyo, Dona Dolores Gutierrez del Arroyo and Francisco Robledo, and says that he is a citizen of the United States, residing in Pueblo Viejo, Porto Rico, with his Post office address at San Juan, and that the defendants are citizens of Porto Rico, and residing at Bayamon, San Juan and Rio Piedras, in said District of Porto Rico, and thereupon your orator says:

I.

That on the 5th day of July 1906, he entered into a contract in writing with the defendant Rafael Gutierrez del Arroyo in representation of himself and his sister, the said Dona Dolores Gutierrez del Arroyo, under the terms of which the defendants agreed to sell to the complainant, and the complainant agreed to buy certain tracts or parcels of land situate in the Municipality of Bayamon, barrio of Pueblo Viejo, Porto Rico, at the stated price of \$55.00 to \$40.00 per acre, as the prices appear, and your orator says that while the said document was, and is in writing, and was drawn by the attorney

3 Alvarez Nava, and that the defendants agreed to make said contract a public document, they have not yet done so, although the terms and conditions under which said document should thus be promulgated were long since realized.

II.

Your orator further says that he is ready to purchase said property, and long since announced his determination to accept the same, he having since the said contract was entered into organized the Graham & Granger Fruit Company, and relying upon his said contract to purchase the land therein described, promised and agreed to sell the same to said company, and that said Company was organized under the basis of being able to acquire the same, which tracts of land, together with the terms of said sale, are stated as follows: to wit:

"In the City of San Juan, Porto Rico, the 5th day of July, 1906, Dn. Rafael Gutierrez del Arroyo and Mr. Robert Graham, (Agree-Contract):

1st. Dn. Rafael Gutierrez del Arroyo binds himself (or agrees) to sell to Mr. Robert Graham an extension of his farm at Pueblo Viejo, which both contracting parties have already surveyed and which may amount to 70 or 75 Cuerdas, at the rate of \$40.00 per Cuerda.

2nd. In like manner he agrees to sell another small piece of land, also by them surveyed, and which may have an extension of approximately 14 Cuerdas, at the rate of \$50.00 per Cuerda.

3rd. Likewise he agrees to sell other 200 or 300 Cuerdas of the same farm, in that part of the farm which they have (concurrently) designated in unison, at the rate of \$55.00 per cuerda.

4th. The parcels indicated in Nos. 1 and 2 shall be paid for in Cash. The parcel indicated in the third number must be paid for in installments within the two years following the execution of the deed.

III.

The complainant further says that after he had entered into said contract for the purchase of said land, to wit, on or about
4 the 27th of April, 1908, complainant believed that he would be able to sell and dispose of said land far in excess of the price fixed in the said agreement to sell, and that because of the increased value in said land, he stated to said Rafael Gutierrez del Arroyo, that he would divide with him whatever he, complainant, should receive as the purchase price of said land in excess of the sum of \$55.00 per acre, your orator believing at that time that it would be possible to dispose of the land in question for about \$100.00 per acre: and your orator further says, that even after it appeared that said sale would not probably be made at the price last stated, he nevertheless realized that the said land had increased in value since his agreement to purchase the same, and at a still later date he stated to said Rafael Gutierrez del Arroyo, that if he, the said Rafael Gutierrez, in behalf of himself and his sister Donna Dolores, would execute the

proper documents of transfer of said property without causing the complainant any cost, trouble or delay, he would allow him \$70.00 per acre in place of the \$55.00 per acre stated in the said contract of sale first referred to; and your orator further says that on the said 27th day of April, 1908, the said Rafael Gutierrez ratified said contract in a letter written to your orator under that date, in which he for himself and his said sister renewed his said contract to sell as first referred to.

IV.

Your orator further says that afterwards, to wit, on the — day of September, 1909, he tendered to the defendants, the said Rafael Gutierrez, for himself and for his said sister, the sum of \$3,000.00, the same being in payment for the land composed of about 70 to 75 acres more or less as described in said agreement to sell, the said tender having been made in lawful money of the United States of America, (in payment of the purchase price of said land), in the City of San Juan, and in the office of your orator's solicitors on said date, but that the said defendant for himself and his sister
5 declined and refused to accept said money, or to execute the contract stated.

V.

Your orator further says that the said Rafael Gutierrez del Arroyo, acting for himself and his said sister Dona Dolores Gutierrez del Arroyo, now refuses to execute said contract, or any part thereof, and declares that he and his said sister will not execute the same and as a reason therefor, aver that the said contract is no longer of any binding force or effect upon said defendants; but your orator will submit for the consideration of your Honor a translated copy of said contract, at the trial of this cause, and further submit whether or not the same is a valid contract, as your orator is informed and verily believes the same to be; and your orator further says that he is informed and believes that the said contract is in full force and effect, and that he may of right ask that defendants be required to execute the same, all as they promised and agreed to do. Your orator further says, that acting upon the strength of said agreement, and having full faith in the execution of the same on the part of defendants, he has considered himself as having an interest in said property, and has expended considerable sums of money in defending the same, and in costs affecting said property in actions pending in this Court, in procuring contracts relative to the same, and he did in fact, as a portion of the consideration for the right to purchase or sell said lands, at the earnest solicitation of said Rafael Gutierrez Arroya, purchase the interest in said property of Miss Felicia Fernandez, paying therefor the sum of Eight Hundred Dollars (\$800.00), and is now the owner of said interest, and in so shaping his property interests generally, that he might be able to purchase the same as by the terms of said contract he agreed to do, and your orator says that his losses and expenses in the manner and form referred to and as hereinafter appears amounts approximately to the following sum, to wit: Twenty-five Thousand Dollars.

Your orator further says that the said Francisco Robledo claims to have some sort or kind of interest in said estate antagonistic to the rights of your orator in the premises, the exact nature of which your orator believes to be a lease of certain of said premises to said Robledo from said Gutierrez; but your orator further says that the said lease was made by said Robledo with a full knowledge of your orator's rights in the premises, and because thereof your orator submits that any interest, claim or right, or pretended claim or right held by said Robledo ought to be subjected to the rights of your orator in the premises; and further, your orator is informed and believes that said Robledo contemplates cultivating said premises, or a large portion thereof, for sugar cane, and your orator says that such action on his part would result in great damage to your orator, as the same would interfere with the improvement of the same by the said Graham & Granger Fruit Company, in that pineapple slips have been engaged for said land, and the inability to utilize the same would damage complainant several thousands of dollars, as he has caused said slips to be prepared for planting in said premises, as well as the damage to him consequent upon his inability to carry out his said contracts of sale, and the extension of his business as contracted.

For as much as your orator can have no adequate relief, except in this Court, and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And your orator prays that the defendants may be decreed to execute and deliver to your orator good and sufficient deeds of transfer to the property in this bill of complaint described, all in accordance with the terms and conditions of said contract; provided the said complainant shall within the period of thirty days from the filing of said decree deliver to defendants in good and lawful money of the United States, the sum total of the prices agreed upon as the same are stated in said contract, and provided further that in decreeing the specific performance of said contract the said decree shall further provide that in the event your orator shall fail to pay the said sums of money as specified in said contract, that then, and in that event, the said contract may stand as cancelled and of no further force and effect as between your orator and the defendants Rafael Gutierrez del Arroyo, and his sister, Dona Dolores Gutierrez del Arroyo.

And your orator further prays that the said Francisco Robledo be enjoined from in any manner interfering with the execution of this agreement, and especially from cultivating said land in such manner or form as to prepare the same with crops of cane or otherwise, or at all, and thus cause further expense or loss to any of the parties concerned by reason of any intervention on the part of said Robledo in the occupation, control, or management of said land or any part thereof. Complainant asks that a preliminary injunction

be issued restraining the said Robledo from in any manner interfering with said property as aforesaid, pending the trial of this cause.

May it please your Honor to grant unto your orator not only a writ of injunction conformably to the prayer of this bill, and also a writ of subpoena of the United States of America directed to the said Rafael Gutierrez del Arroyo, Dona Dolores Gutierrez del Arroyo and Francisco Robledo commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper, and required by the principles of equity and good conscience.

(Signed)

SWEET & WILCOX,
Solicitors for Complainant.
ROBERT GRAHAM,
Complainant.

(Signed)

8 UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Robert Graham, being duly sworn says; that he is the complainant above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief and as to those matters and things he believes it to be true.

(Signed)

ROBERT GRAHAM.

Subscribed and sworn to before me this 18th day of October, 1909.

(Signed)

JOHN L. GAY,
Clerk Dist. Court of U. S. for P. R.
By A. M. BACON, *Deputy.*

(Signed)

9 *(Subpoena in Chancery.)*

(Filed Oct. 21, 1909.)

In the District Court of the United States for Porto Rico, in Chancery, Sitting at San Juan.

No. 672, Equity.

ROBERT GRAHAM, Complainant,

vs.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLED0, Defendants.

Subpoena.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

The President of the United States to Rafael Gutierrez del Arroyo, Doña Dolores Gutierrez del Arroyo, and Francisco Robledo, Greeting:

You are hereby commanded that you be and appear in the said District Court of the United States for Porto Rico, aforesaid, at the

court-room of said Court in the City of San Juan, on the first Monday in December, 1909, the same being the sixth day of that month, then and there to answer a certain Bill in chancery exhibited against you in said Court by Robert Graham, and to do and receive what the said Court shall have considered in that behalf, and this you are not to omit under penalty of five thousand dollars (\$5,000.00).

Witness, the Hon. Bernard S. Eodey, Judge of the District Court of the United States for Porto Rico, this eighteenth day of October, A. D., 1909; and in the 134th year of the Independence of the United States of America.

Attest:

(Signed)

JOHN L. GAY, *Clerk*,
By A. M. BACON, *Deputy*.

10

Memorandum.

(Pursuant to Rule 12, Supreme Court U. S.)

You are hereby commanded to enter your appearance in the above entitled suit on or before the first Monday in December next, the same being the 6th day of said month, A. D., 1909, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said bill may be taken pro confesso.

(Signed)

JOHN L. GAY, *Clerk*,
By A. M. BACON, *Deputy*.

Received this writ on the 18th day of October A. D., 1909. And on the — day of — A. D., 19—, I served the same by handing a true copy thereof to said ——. And on the — day of — A. D., 19—, I left a like copy thereof at the usual place of residence of the said ——.

— — —, *Marshal*.
— — —, *Deputy*.

11

Return on Service Writ.

UNITED STATES OF AMERICA,

The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Subpoena on the therein-named Rafael Gutierrez del Arroyo by handing to and leaving a true and correct copy thereof with him personally at Bayamon in said District on the 19th day of October, A. D. 1909.

(Signed)

H. S. HUBBARD,

U. S. Marshal.

(Signed)

FRED E. BURNETT, *Deputy*.

Return on Service Writ.

UNITED STATES OF AMERICA,

The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Subpoena on the therein-named Doña Dolores del Arroyo by handing

to and leaving a true and correct copy thereof with her personally at San Juan in said District on the 20th day of October, A. D. 1909.

(Signed)

H. S. HUBBARD,

U. S. Marshal.

(Signed)

FRED E. BURNETT, Deputy.

Return on Service Writ.

UNITED STATES OF AMERICA,

The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Subpoena on the therein-named Francisco Robledo by handing to and leaving a true and correct copy thereof with him personally at Rio Piedras in said District on the 19th day of October, A. D. 1909.

(Signed)

H. S. HUBBARD,

U. S. Marshal.

(Signed)

FRED E. BURNETT, Deputy.

12

Answer of Gutierrez del Arroyo, R. and D.

(Filed December 4th, 1909.)

In the United States District Court for Porto Rico.

In Equity. No. 672.

ROBERT GRAHAM, Complainant,

vs.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLEDOS, Defendants.

Answer of Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo to the Bill of Complaint of Robert Graham.

These defendants now and at all times hereafter saving to themselves all and all manner of benefit of exception or other wise that can or may be had or taken to the many errors, uncertainties and imperfections in the said Bill of Complaint contained, for answer thereto or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

I.

That it is true that on the 5th of July, 1906, these defendants entered into a certain agreement with the complainant, a written memorandum of which agreement is translated into the English language, as follows:

"Memorandum.

In the City of San Juan, Porto Rico, the 5th day of July, 1906, Don Rafael Gutierrez del Arroyo and Mr. Robert Graham agreed: 1st,

Don Rafael Gutierrez del Arroyo compromised himself to sell to Mr. Robert Graham a parcel of his estate in Pueblo Viejo, which both parties have already fixed the boundaries of and which may extend up to 70 or 75 cuerdas, at the price of \$40.00 per cuerda. 2nd, he also compromised himself to sell to him another small extension of land, which they also fixed the boundaries of, and which may have an extension, approximately, of 14 cuerdas at the price of 13 \$50.00 per cuerda. 3rd, he also compromised himself to sell to him other 200 or 300 cuerdas of the same estate, in that part of which, which they have also already designated, at the price of \$55.00 per cuerda. 4th, the parcels indicated in Nos. 1 and 2 shall be paid in cash. The parcel indicated in the third number shall be paid in installments during the two years following the delivery of the document. Mr. Graham shall not pay any interest for the extended time of payment; but Mr. Arroyo shall remain in possession and usufruct of the part of the estate sold and not paid for, until the payment shall be made. Mr. Graham shall execute a mortgage on the estate to secure the payment. 5th, this contract shall be extended in a public document as soon as Mr. Graham will have ultimated the deal which is now pending with Doña Felicia Fernandez about the purchase of an undivided part in the same estate. In case that deal should not be carried to effect, this contract will also remain without virtue or effect. 6th, this contract is also dependent upon the condition that Don Rafael Gutierrez del Arroyo could rescind the contract of lease which he now has with Don Eleuterio Landrau.

(Signed)

ROBERT GRAHAM.

RAFAEL GUTIERREZ DEL ARROYO."

The defendants aver that said contract was made with the intention that if those conditions mentioned in the two last paragraphs of the said agreement should be carried out, that then the sale shall be made immediately or within a reasonable time. But the defendants aver that none of these conditions have been carried out. Defendants aver that Mr. Graham has finished, as they are informed and believe, his deal with said Felicia Fernandez, but they are informed and believe that he has not yet inscribed his title to the said part ownership.

They further aver that it was not possible for them to rescind the contract of lease with Mr. Eleuterio Landrau, above mentioned, during the term of said contract with him, for reasons over which these defendants have no control. They therefore aver that the said contract of sale copied above between these defendants and the complainant remains null and void on account of the non-fulfillment of the said conditions.

II.

These defendants further show to this Honorable Court that the said contract of sale between these defendants and the complainant has not been ratified by these defendants on the 27th of April, 1908, or at any other time, but they aver to the contrary, that on the

14 said 27th of April, 1908, said contract was in part rescinded by a writing which, translated into the English language literally is as follows:

"On the 27th of April, 1908, the contracting parties make addition to the 3rd clause of this contract in the sense that the excess of price which Mr. Graham may obtain over the \$55.00 per cuerda shall be divided between him and Mr. Arroyo at 50 per cent. each.

(Signed) ROBERT GRAHAM.

(Signed) RAFAEL GUTIERREZ DEL ARROYO."

These defendants aver that as to that part of the agreement of sale which refers to the 200 or 300 cuerdas mentioned in the 3rd clause of said contract, the promise of sale of said parcel of land, by mutual agreement, as expressed in the said writing of the said date of 27th of April, 1908, has been changed and transformed into an agreement that Mr. Graham shall look for a purchaser at a good price for said parcel and that he may receive as his commission one-half of any sum paid over and above the price of \$55.00 per cuerda. These defendants aver that that was the understanding between them and the reason for putting down the change of that clause in writing. They therefore aver that the first agreement as to this parcel of 200 or 300 cuerdas remained null and void and without any further effect except as to the commission to be paid to Mr. Graham in case of his being able to sell profitably the said parcel over and above the price of \$55.00 per cuerda.

III.

These defendants further show to this Honorable Court that on or about the 31st of April, 1909, Mr. Graham has manifested to Mr. Rafael Gutierrez del Arroyo, who was all the time acting in behalf of both defendants, that he considers any agreement as to those 200 or 300 cuerdas, mentioned in the third clause of the said contract, rescinded and of no effect any more for the reason that he could not find any purchaser at the prices there mentioned.

IV.

15 These defendants further show to this Honorable Court that the contract of lease with Eleuterio Landrau, mentioned in the last clause of the said contract, expired by termination of its term, on the 31st of April, 1909. They aver that they then had to look for another tenant so as to have the benefit of the cultivation of said estate, to which benefit and usufruct these defendants were entitled, first, because the contract of sale and also the second contract of commission to sell both were at that time rescinded by the complainant, and second, because even under the terms of the first contract, Clause 4, they had a right to the possession and usufruct of that part of the estate even for two years after a public document should have been made for the sale of said parcel. That the defendants then made a contract of lease of said parcel with Francisco Robledo, codefendant herein, as they lawfully had a right to do, on the 10th of June, 1909. That the complainant Mr. Gra-

him, was aware of such contract of lease at the time it was made; and that the complainant went even so far as to recognize indirectly the legality of said lease in a public document of lease of the smaller two parcels made between these defendants and the complainant, on the 10th of August, 1909, in which public document it is especially stated that the larger parcel included in the estate was leased by these defendants to the codefendant, Francisco Robledo. And these defendants say that the complainant is thereby estopped from attacking in any manner the said lease between these defendants and the codefendant, Francisco Robledo.

V.

These defendants further say that on the said 10th of August, 1909, an agreement of lease of the smaller two parcels mentioned in the first contract of option — sale, of the date of the 5th of July, 1906, was made and celebrated between these defendants and complainant, Mr. Graham, in a public document made in the City of San Juan, before a Notary Public, and that although it is stated in the said document and lease that it should not affect any differences which the parties may have concerning those two parcels, still these defendants aver that the conduct of the complainant in taking from these defendants a lease for the said two parcels clearly shows that the contract of sale was by him considered as rescinded. And these defendants therefore say that the complainant is thereby estopped from claiming the benefit of the said agreement of option of sale.

VI.

These defendants further aver that, as can be seen from the tenor of said agreement of option of sale of the 5th of July, 1906, the first parcel mentioned in the first clause was vaguely stated that it may reach the extension of 70 or 75 cuerdas, and they say that it was so stated because the contracting parties did not know the exact extension of it. And these defendants aver that the second parcel mentioned in the second clause was also stated approximately as to the extension of 14 cuerdas. These defendants aver that those two parcels mentioned in Clauses 1 and 2 are the very same parcels which were leased from them by Mr. Graham, complainant herein, in the public document of the 10th of August, 1909, as above mentioned.

These defendants aver that the extension of the first parcel was found to be smaller than 70 cuerdas and that its extension is not exactly known to the defendants, and they further say that the complainant insists that they should give him a deed for 70 or 75 cuerdas in the first parcel. And they say that this is the reason that these defendants, although no more bound to sell to Mr. Graham, complainant herein, those parcels mentioned in Clauses 1 and 2 of the contract, by any agreement to that effect, but still willing voluntarily to do so, nevertheless are prevented from doing so by the complainant's insistence that they should give him a deed for 70 or 75 cuerdas as to the first parcel, although he well knows that

the said parcel may not contain that extension. These defendants state that that was the reason that they refused to accept the complainant's proposition mentioned in Paragraph 4 of the said Bill of Complaint, and they further aver that they are still voluntarily ready and willing to execute deeds to the said two parcels mentioned in 1st and 2nd clauses of the said contract, with their proper measurements, which may be ascertained by a proper survey of those two parcels.

17

VII.

These defendants further say that they are strangers to all the matters and things in the said Bill of Complaint contained, which relate — the complainant's dealings with the Graham & Granger Fruit Company, or to any expenses made by him relating to the property in question, and they therefore specifically deny those matters and things alleged and leave complainant to make such proof thereof as he shall be able to produce. But these defendants aver that they are not responsible for any such dealings or expenses made by the complainant, because he well knew that the said contract of option of sale was no more in force and effect on account of his rescission of it and also on account of its being only a conditional and contingent contract and that those contingencies did not materialize. These defendants say that whatever expenses and dealings the complainant entered into he did so at his own risk and responsibility and that these defendants are not liable for such.

VIII.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said complainant's Bill of Complaint charged. Without this there is any other matter, cause or thing in said complainant's Bill of Complaint contained material and necessary for these defendants to make answer to and not herein or hereby well and sufficiently answered, confessed, traversed, or avoided, or denied, is true to the knowledge or belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf.

(Signed) RAFAEL GUR. DEL ARROYO.

DOLORES G. DEL ARROYO.

(Signed) C. M. BOERMAN,

Solicitor for Defendants, Rafael Gutierrez del Arroyo, Dolores Gutierrez del Arroyo.

18

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Rafael Gutierrez del Arroyo, being duly sworn, says: That he has heard read to him and translated the foregoing answer. That said answer is true in substance and fact, to his own knowledge,

except as to the matters stated to be upon information and belief, and as to those he believes it to be true.

(Signed)

RAFAEL GUR. DEL ARROYO.

Subscribed and sworn to by Rafael Gutierrez del Arroyo, personally known to me, before me, this twenty-ninth day of November, nineteen hundred and nine.

(Signed)

F. DE LA TORRE,

Notario.

19

Answer of Francisco Robledo.

(Filed Dec. 4, 1909.)

In the United States District Court for Porto Rico.

In Equity. No. 872.

ROBERT GRAHAM, Complainant,

VS.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLEDO, Defendants.

Answer of Francisco Robledo to the Bill of Complaint of Robert Graham.

This defendant now and at all times hereafter saving to himself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said Bill of Complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

I.

This defendant avers that at the time of the making of the lease of the premises let to him by Rafael Gutierrez del Arroyo, co-defendant herein, this defendant was only informed of a promise of sale by the said Gutierrez to the complainant of a certain parcel lying West of the premises leased by this defendant, and was totally ignorant and had no information whatever of any promise or contract of sale in favor of Mr. Graham, the complainant herein, of the parcels amounting to two hundred or three hundred cuerdas mentioned in the complaint or in the contract referred to in the complaint, which parcel is situated in an opposite direction from that mentioned before. And as to the said mentioned contract this

20 defendant avers, upon information and belief, that the conditional contract of an option of sale made between the complainant, Robert Graham, and the co-defendants herein, Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo, on the 5th day of July, 1906, never went into effect on account of the contin-

gencies mentioned therein not having materialized. That the said contract in full reads as follows:

"Memorandum."

"In the City of San Juan, Porto Rico, the 5th day of July, 1906, Don Rafael Gutierrez del Arroyo and Mr. Robert Graham agreed: 1st, Don Rafael Gutierrez del Arroyo compromised himself to sell to Mr. Robert Graham a parcel of his estate in Pueblo Viejo, which both parties have already fixed the boundaries of and which may extend up to 70 or 75 cuerdas, at the price of \$40.00 per cuerda. 2nd, he also compromised himself to sell to him another small extension of land, which they also fixed the boundaries of, and which may have an extension, approximately, of 14 cuerdas, at the price of \$55.00 per cuerda. 3rd, he also compromised himself to sell to him other 200 or 300 cuerdas of the same estate, in that part of which, which they have also already designated, at the price of \$55.00 per cuerda. 4th, the parcels indicated in Nos. 1 and 2 shall be paid in cash. The parcel indicated in the third number shall be paid in installments during the two years following the delivery of the document. Mr. Graham shall not pay any interest for the extended time of payment: but Mr. Arroyo shall remain in possession and usufruct of the part of the estate sold and not paid for, until the payment shall be made. Mr. Graham shall execute a mortgage on the estate to secure the payment. 5th, this contract shall be extended in a public document as soon as Mr. Graham will have ultimated the deal which is now pending with Doña Felicia Fernandez about the purchase of an undivided part in the same estate. In case that deal should not be carried to effect, this contract will also remain without virtue or effect. 6th, this contract is also dependent upon the condition that Don Rafael Gutierrez del Arroyo could rescind the contract of lease which he now has with Don Eleuterio Landrau.

(Signed) ROBERT GRAHAM.
RAFAEL GUTIERREZ DEL ARROYO."

This defendant also avers, upon information and belief, that the 3rd clause of the said contract has been changed by an addition thereto, made on the 27th of April 1908, which addition reads, as follows:

"On the 27th of April, 1908, the contracting parties make addition to the third clause of this contract in the sense that the excess of price which Mr. Graham may obtain over the \$55.00 per cuerda shall be divided between him and Mr. Arroyo at 50 per cent. each.

(Signed) ROBERT GRAHAM.
RAFAEL CUTIERREZ DEL ARROYO."

21 This defendant further avers, upon information and belief, that this clause, even as changed by the said addition thereto, has been fully rescinded in April, 1909, between the parties thereto.

II.

This defendant avers that when he made the contract of lease with the co-defendants, Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo, he understood them to be the owners of that property including the parcel of 200 to 300 cuerdas mentioned in the third clause of said contract and that they had a perfect right to make said lease to this defendant, and this defendant further avers that the complainant, Mr. Graham, has had knowledge of said lease right from the beginning of it and that he, the said complainant, in a public document made on the 10th of August, 1909, specially admits his knowledge of such lease between Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo, parties on one side, and this defendant, party on the other side, and that said lease included the whole of the estate except the two small parcels mentioned in clauses 1 and 2 of the said above copied contract, which then and there, by said public document, were let to Mr. Graham by the owners thereof. This defendant avers that Mr. Graham is estopped by his own acts and confessed knowledge from claiming on his behalf anything against this defendant.

III.

This defendant further avers that he, having made a legal lease of the said property of the 10th of June, 1909, has commenced to cultivate the same and has gone to considerable expense therein, and that the complainant, Mr. Graham, knowing all this and the great expenses to which this defendant has been put, stood all the time by without warning or protest thereof and that he is therefore guilty of gross laches and negligence in that behalf to the great injury and damage of this defendant and that the complainant is thereby estopped from making any claim now against this defendant.

22

IV.

This defendant further says that he is a stranger to all the matters and things in the said Bill of Complaint contained, which refer to the complainant's dealings with the Graham & Granger Fruit Company and to the complainant's expenses on behalf of said property, and therefore he specifically denies those matters and things alleged and leaves the complainant to make such proof thereof as he shall be able to produce. But this defendant avers that whatever dealings and expenses have been entered into by the said complainant, he entered into them on his own risk and peril, and that this defendant is not in any way responsible for them. This defendant further says that if the complainant has entered into the alleged dealings and expenses, he did so negligently and has to bear the consequences himself, and cannot, in justice or equity, claim any liability for his own acts against this defendant.

V.

This defendant further avers that he is an innocent third party, who leased the premises for valuable consideration and without any

knowledge of any rights of the complainant to such premises, and the defendant claims all the benefits of the law in his behalf in this respect.

VI.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by said bill charged. Without this there is any matter, cause or thing in said complaint contained, material and necessary for this defendant to make answer to, and not herein or hereby well and sufficiently answered, confessed, traversed, or avoided, or denied, is true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and he prays to be hence dismissed with his reasonable charges and costs in his behalf.

(Signed)

FRANCISCO ROBLED0.

(Signed)

C. M. BOERMAN,

Solicitor for the Defendant Francisco Robledo.

23 UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Francisco Robledo, being duly sworn, says: That he has heard read to him and translated the foregoing answer. That said answer is true in substance and fact, to his own knowledge, except as to matters stated to be upon information and belief, and as to those matters he believes it to be true.

(Signed)

FRANCISCO ROBLED0.

Subscribed and sworn to by Francisco Robledo, personally known to me, before me, this twenty-ninth day of November, nineteen hundred and nine.

(Signed)

FRANCISCO ROBLED0.

(Signed)

F. DE LA TORRE,

Notary Public.

24 *Journal Entry.*

(Feb. 23, 1910.)

In the District Court of the United States for Porto Rico.

No. 672. Equity.

ROBERT GRAHAM

vs.

RAPAEL GUTIERREZ DEL ARROYO et al.

This cause comes on for trial and comes the complainant Robert H. Graham, and represented by his counsel Messrs. Sweet & Wilcox, and come the respondents in their own proper persons and by their counsel C. M. Boerman. Thereupon on request of counsel for the

complainant, counsel for the respondents not objecting thereto, he is permitted to amend the bill of complaint herein by substituting page number five thereof by a rewritten one, and it is understood that the allegations so contained in that part of the complaint as amended are to be considered as now duly traversed.

The trial is thereupon proceeded with, divers exhibits are introduced in evidence and the Court hears the testimony of witnesses for the parties, and at the conclusion thereof the cause is submitted, counsel to file briefs in the premises by the fifth proximo.

25

Journal Entry.

(May 7, 1910.)

In the District Court of the United States for Porto Rico.

672. Equity.

ROBERT GRAHAM

VS.

RAFAEL GUTIERREZ DEL ARROYO et al.

This cause having heretofore been submitted after oral arguments, on the record and briefs of counsel, the Court on this day sends an opinion to the files giving its reasons for its action, and finding the issues principally for complainant and ordering the specific performance of the contract and providing for the appointment of a Surveyor to settle the lines and make a survey to enable the deeds to be made and ordering the preparation of a decree by counsel for complainant as soon as such survey comes in and is approved and ordering that the costs be taxed as in said opinion set forth and holding the case open for all of said purposes.

26

Opinion.

(Filed May 7th, 1910.)

In the District Court of the United States for Porto Rico.

Equity. No. 672.

ROBERT GRAHAM, Complainant,

VS.

RAFAEL GUTIERREZ DEL ARROYO, Doña DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLEDO, Respondents.

This is a bill in equity which was filed October 18th, 1909. It is for the specific performance of a contract or agreement to purchase land. The answers of all the respondents were filed under date of December 4, 1909, and a trial was had on the issue thus raised, in

open court before the chancellor without the intervention of an examiner or master, under date of February 23, 1910. Thereafter the Stenographer transcribed his notes and counsel for the respective parties filed briefs, which, together with the record, the exhibits and the pleadings, we have just carefully gone over, and therefore are prepared to decide the cause on its merits.

The contract on which the suit is based, is dated July 5, 1906, a translation of which from the Spanish is as follows:

"Memorandum.

In the City of San Juan, Porto Rico, the 5th day of July, 1906, Don Rafael Gutierrez del Arroyo and Mr. Robert Graham agreed: 1st, Don Rafael Gutierrez del Arroyo compromised himself to sell to Mr. Robert Graham a parcel of his estate in Pueblo Viejo, which both parties have already fixed the boundaries of and which may extend up to 70 or 75 cuerdas, at the price of \$40.00 per cuerda. 2nd, he also compromised himself to sell to him another small extension of land, which they also fixed the boundaries of, and which may have an extension, approximately, of 14 cuerdas, at the price of \$50.00 per cuerda. 3rd, He also compromised himself to sell to him other 200 or 300 cuerdas of the same estate in that part of it which they have also already designated, at the price of \$55.00 per cuerda.

27 4th, the parcels indicated in Nos. 1 and 2 shall be paid for in cash. The parcel indicated in the 3rd number shall be paid for in installments during the two years following the delivery of the document. Mr. Graham shall not pay any interest for the extended time of payment, but Mr. Arroyo shall remain in possession and usufruct of the part of the estate sold and not paid for, until the payment shall be made. Mr. Graham shall execute a mortgage on the estate to secure the payment.

5th, this contract shall be extended into a public document as soon as Mr. Graham shall have consummated the deal which is now pending with Doña Felicia Fernandez for the purchase of an undivided part in the same estate. In case that deal should not be carried into effect, this contract will also remain without force or effect. 6th, this contract is also dependent upon the condition that Don Rafael Gutierrez del Arroyo can rescind the contract of lease which he now has with Eleuterio Landrau.

(Signed) ROBERT GRAHAM.
RAFAEL GUTIERREZ DEL ARROYO."

The third respondent Robledo is made a party only because he became lessee of some of the property that is in controversy, after the making of the contract but before its fulfillment, but, as complainant contends, with full notice of the latter's rights.

It will be seen that by this contract the first two named respondents agree to sell three parcels of land to the complainant, one of seventy or seventy-five cuerdas at the price of \$40.00 per cuerda, another of fourteen cuerdas at the price of \$50.00 per cuerda, and

another tract of land to be carved out of a larger estate, the portion contracted for to contain two or three-hundred cuerdas, at \$55.00 per cuerdas. These several tracts were, it appears, a portion of a farm or finca known as "Pueblo Viejo Arriba" which contained probably seven or eight hundred cuerdas in all, situated in the barrio of Pueblo Viejo in the District of Bayamon, south and across the bay from San Juan, Porto Rico.

28 It will also be seen that apart from the promise for a promise, which is a good consideration in law, part of the consideration to move from the complainant was the purchase by him of a small outstanding undivided interest of Felicia Fernandez, which she had in the larger tract, from which the two to three hundred cuerda tract was to be segregated.

We might state here that, while it is not mentioned in the contract, the evidence clearly showed that it was intended that, when complainant did purchase this outstanding undivided interest, it would not only clear the title to the piece he was to get, but it was intended that it should also clear the title to the balance of that larger tract that would then remain in the hands of the first two mentioned respondents, they of course to allow the complainant in his payment for what he bought, a proper proportion of the purchase price of the outstanding interest that should be charged to the portion which they retained.

It appeared in the evidence that at the time this contract was made, most of the land contracted for was under lease to one Eluterio Landrau, and which lease had considerable time, probably more than a year, still to run, and as to the portion such lessee was interested in at least, the contract was not to be consummated, or at least complainant could not get complete possession of it until such lease had expired, and it was agreed that efforts should be made by the main respondents to induce him to give up the lease in the meantime, which it transpired he refused to do, and hence this caused considerable delay in and about the matter. It was in evidence that complainant went to a lot of expense in anticipation of getting the land, in the way of procuring fruit trees, nursery plants, etc., and that he finally organized a fruit company and assigned all his rights under the contract in question to it as a part of his contribution of capital thereto, and in many other ways went to heavy expense because of the contract.

29 It was also well in evidence that on the 27th of April, 1908, complainant had a supposed opportunity (which afterwards fell through) to sell the larger tract of land for a large advance on the price he was to pay therefore under the contract, and therefore complainant of his own free will, and simply as a favor to the main respondents, as he says, on that date made an addition to the third clause of the contract, that he would divide with them any sum he should sell the same for over and above the contract price of \$55.00 per cuerda as agreed upon.

It is useless for us to detail the evidence which is comprised in sixty-seven pages of typewritten transcript, because we can state the substance of it much easier. For one reason and another partic-

ipated in by both parties, the contract was not consummated as soon as it ought to have been perhaps, but most of the latter part of the delay was caused by the respondents refusing to deed the quantities of land which they had agreed by the contract to transfer, and by a dispute as to whether or not the larger tract contracted for was to extend northward to the American Railroad which borders it on that side.

During the trial the Court saw so little dispute between the parties as that it expressed astonishment that they could not settle, and an agreement was arrived at by their answers in open court that the fourteen acre tract will be transferred and accepted even if the same runs an acre or so short of the quantity, and that the seventy or seventy-five acre tract will also in like manner be transferred, but it is agreed that the same is to contain somewhere about sixty-eight acres, leaving a certain roadway in possession of the grantors to comprise about two acres of what the tract was found to contain, which was some seventy acres.

A large blue print plat or map was introduced in evidence as exhibit C for the respondents, and it is agreed that parcela No. 1 marked thereon is the same parcela said to contain seventy to 30 seventy-five cuerdas, but which is marked on this map as containing 57-74/100 cuerdas, and that the deficiency of about ten cuerdas occurs because the southwest corner line, instead of being turned to the northwest as it is on the map, ought to have continued southwest so as to include ten additional acres. This the Court finds to be the truth, and finds that complainant is entitled to have that quantity included therein. The portion marked parcela No. 5 is said to be properly delineated on the plat in question, and therefore there is no dispute about that.

The large tract marked parcela No. 4 is the one about which the dispute arises. It is bounded on the east by land belonging to a certain Mr. Cerecedo; on the south by land belonging to Mr. Wilson, but there is a tract marked parcela No. 7 on the map that is in dispute, and the land agreed to be conveyed lay to the north of that, and was to be high and dry ground, and bounded on the west by the low lands that border the Quebrada Margarita, and was to extend northward to the railroad as complainant claims, but only to near the road that runs into the siding, or in other words, to the end of the high ground, as respondents claim, thus leaving some ten cuerdas or more between its north line and the railroad right of way.

On page 67 of the transcript, the complainant stated in his own words to the Court as follows:

"I am perfectly willing to accept at the prices named in the contract, 68 acres as Your Honor and I have spoken of there, leaving Mr. Arroyo the entrance to that track; 68 out of the 70 acres. The 13 acre piece remains as outlined at the prices outlined. On the large piece I am willing to take whatever may be contained in the piece from Wilson's line to the railroad, and high land only, such as Mr. Arroyo speaks of. It may contain 220. I am perfectly willing within that limit that you may define or put into such decision as you may cause, the fact that I have got to leave that road-

way open for public use and in no manner hinder the use by other people.

31 The COURT:

Q. You agree to leave that road to run with the land?

A. Yes, and they on their part agree to open the road in the same way. He has now got a rancho at the mouth of it and he wants to take that away; the prices as per the contract. The price is fifty-five."

It will thus be seen that there is not very much to settle in this case, save the quantity of land to be conveyed under this agreement for two or three hundred cuerdas, and its boundary lines, and we unhesitatingly hold on the evidence that it was understood at the time between the parties that that tract was to begin on the south at the north line of the land that is in dispute with Mr. Wilson, and running hence north to the railroad track with the land of Cerecedo on the east as a boundary, and extending westward so as to include all the land that is high and dry, but little or none of the bottom lands that lie along the Quebrada Margarita, so that the whole tract will make, as complainant claims, about 320 cuerdas, more or less.

We also hold from the evidence that the road running from the west through the northwest corner of this tract thus to be conveyed, to the railroad, was intended to be kept open, and complainant in his agreement above set forth agrees that this is true, and that he will accept a deed with a condition to that effect in it, but that respondents must in like manner keep that road open and remove certain obstructions they are said to have in it near the railroad, and this we think is proper.

The question now arises as to third respondent Francisco Robledo. He, as stated, is the lessee. It appears that on the 10th of January, 1900, he entered into a six year lease to begin on July 1st following, of practically this entire large estate mentioned above, save that there was specifically excluded from it the two smaller tracts mentioned in complainant's contract. This particular respondent denies absolutely that he had any knowledge of the outstanding contract in favor of complainant as to the larger tract of two or three hundred cuerdas, which is to be carved out of parcela No. 4 as

32 aforesaid, and that therefore he is an innocent lessee for value. We have gone over the whole evidence again and of course have a clear recollection of the evidence as given orally on the stand, and we are of opinion that this claim is unfounded. The lease to him was made in the office of the same lawyer who did all the business for the parties to this suit from the beginning, and who knew all about the situation, and in the lease itself two of the parcels under contract to complainant (the smaller ones) are specifically excluded therefrom, and complainant's contract to purchase the same specifically mentions them, and hence we regard it as extremely improbable that Robledo did not hear or know about the making of this contract or its existence as to the larger tract. In fact under all the circumstances, we think he was put upon

inquiry as to complainant's rights. Complainant, on seeing this respondent lessee go into possession of the land and attempt to plant it, immediately protested, and on the whole the evidence as shown by the record is such as to induce us to believe that the principal respondents and this lessee just took chances that complainant's rights would not be enforced, and we have reasonable ground to believe that there is an understanding or bargain between them to the effect that the lessee shall not suffer, because little or no cultivation was put by the lessee on the high and dry portion of parcela No. 4, evidently leaving that until it should be determined what would become of complainant's claim thereto.

On the whole case therefore we feel that complainant has proved every material allegation of his will as against all the respondents, and we so find, and that the main respondents should be required to deed the three tracts of land for the prices specified in the contract and in quantities as per the agreement of complainant supra, because

23 we are of opinion that, as the evidence shows that complainant did not make the sale for more than \$55.00 of the larger tract, but turned it into a company he had organized, at the original contract price, he should not be obliged to pay any more therefore. We further hold that as a condition to this, complainant must deed the undivided interest he purchased from Felicia Fernandez to the main respondents as to that portion that remains in their possession after his part has been deeded to him, he to be allowed in his payments for what he gets, the proper relative portion of what he paid for said Felicia's undivided interest in the portion that remains to respondents.

We hold that the matter or damages for actual plowing or planting, if any, between Robledo and the main respondents is not an issue in this suit because as to this complainant we hold that Robledo had knowledge which binds him.

In his brief, counsel for complainant requests the Court to order a survey at the joint expense of the parties and a report thereon, and we think this request is just, save that we think the costs ought to be entirely charged to complainant because it is, under the circumstances, entirely for his benefit, and therefore we will name a surveyor who will go to the ground, the parties to be present if they desire, and who will survey the high and dry ground northward from the line of parcela No. 4, excluding the tract that is in dispute, as per the map, with Mr. Wilson, and using the Cerecedo line as an eastern line, measure the high and dry ground northward to the right of way of the railroad and running the westerly line at a point that will make the area be about 220 cuerdas or so, and, if possible, have this line include a small portion of the most easterly part or bend of the Quebrada Margarita, even though that should make the whole area slightly more than 220 cuerdas. And on the incoming and approval of such plat, counsel for the complainant will prepare a decree making all the findings of fact and law as in this opinion set forth, and requiring all things to be done as thereby intended, within a time certain, or in default, providing as may be

34 proper for the making of the deeds by the Court for the parties.

The main costs of the case will go of course go with the decree, save that as aforesaid the survey shall be at the expense of complainant. -The cause will be retained for all proper purposes.

(Signed)

B. S. RODEY, *Judge*.

35

Journal Entry.

(May 17, 1910.)

In the District Court of the United States for Porto Rico.

672. Equity.

ROBERT GRAHAM

VS.

RAFAEL GUTIERREZ DEL ARROYO et al.

Comes now Willis Sweet, counsel for the complainant herein and presents to the Court for signature his findings of fact and conclusions of law in this cause. The Court after examining said findings of fact and conclusions of law, approves and signs the same. To which action of the Court, counsel for respondents duly objects and excepts.

36

Findings of Fact.

(Filed May 17th, 1910.)

In the District Court of the United States for Porto Rico.

Equity. No. 672.

ROBERT GRAHAM, Complainant,

VS.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLED0, Resp.

Findings of Fact by the Court.

The Court, after hearing the evidence in the case, finds as established by such evidence, the following facts:

I.

That on the 5th of July 1906, an agreement was made between the complainant, Robert Graham and Rafael Gutierrez del Arroyo, two of the respondents, which reads as follows:

Memorandum.

In the city of San Juan, Porto Rico, the 5th day of July 1906, Don Rafael Gutierrez del Arroyo and Mr. Robert Graham agreed: 1st, Don Rafael Gutierrez del Arroyo compromised himself to sell to Mr. Robert Graham a parcel of his estate in Pueblo Viejo, which both parties have already fixed the boundaries of and which may extend up to 70 or 75 cuerdas, at the price of \$40.00 per cuerda. 2nd, he also compromised himself to sell to him another small extension of land, which they also fixed the boundaries of, and which may have an extension, approximately, of 14 cuerdas, at the price of \$50.00 per cuerda. 3rd, he also compromised himself to sell to him the other 200 or 300 cuerdas of the same estate, in that part of which, which they have also already designated, at the price of \$55.00 per cuerda. 4th, the parcels indicated in Nos. 1 and 2 shall be paid in cash. The parcel indicated in the 3rd number shall be paid in installments during the two years following the delivery of the document. Mr. Graham shall not pay any interest for the extended time of payment; but Mr. Arroyo shall remain in possession and usufruct of the part of the estate sold and not paid for until the payment shall be made. Mr. Graham shall execute a mortgage on the estate to secure the payment. 5th, this contract shall be extended in a public document as soon as Mr. Graham will have ultimated the deal which is now pending with Doña Felicia Fernandez about the purchase of an undivided part in the same estate. In case that deal should not be carried to effect, this contract will also remain without virtue and effect.

37 6th, this contract is also subjected to the condition that Don Rafael Gutierrez del Arroyo could rescind the contract of lease which he now has with Don Eleuterio Landrau.

(Signed)

ROBERT GRAHAM.
RAFAEL GUTIERREZ DEL ARROYO.

which agreement it appears from the evidence, was made by Rafael Gutierrez del Arroyo for himself and in representation of Doña Dolores Gutierrez del Arroyo.

II.

That subsequent thereto, to wit: on the 27th of April 1908, the following agreement was made between the same parties, to wit:

On the 27th, of April 1908, the contracting parties make addition to the 3rd clause of this contract in the sense that the excess of price which Mr. Graham may obtain over the \$55.00 per cuerda shall be divided between him and Mr. Arroyo at 50 per cent each.

(Signed)

ROBERT GRAHAM.
RAFAEL GUTIERREZ DEL ARROYO.

III.

That thereafter a contract of lease was entered into between Mr. Graham and Rafael and Dolores Gutierrez del Arroyo by which

they let to Mr. Graham the first two and smaller parcels mentioned in Section 1st and section 2nd of the agreement of the 5th of July 1900 and that the said contract of lease is as follows:

Number One Hundred and Two.

In the City of San Juan, Porto Rico, on the 10th of August 1900 before me, Francisco de la Torre y Garrido, lawyer and notary public of this Island, neighbor and resident of the capital thereof. Appear, Don Rafael Gutierrez del Arroyo, 54 years of age, married, property owner and resident of Bayamon, and Mr. Robert Graham, 52 years of age, married farmer and resident of Bayamon.

They appear, the latter in his own right and Mr. Gutierrez del Arroyo also in his own right and besides in the name and representation of his sister Doña Dolores Gutierrez del Arroyo, 75 years of age, widow, property owner and resident of Bayamon, whom, he assures has granted him sufficient power to execute the present deed.

They have in my judgment the legal capacity necessary for the execution of this deed of Lease of Land wherefor they set forth the following preliminary facts:

1. That the parties hereto, Don Rafael Gutierrez del Arroyo, his sister of the same surname and Mr. Robert Graham, are co-owners of the following described property: Farm called Pueblo Viejo Arriba, situated in the barrio of Pueblo Viejo, in the District of Bayamon, bounded on the north by Don Manuel Diaz Coneja and Cerecedo Brothers & Co.; on the east by the same Cerecedo
38 brothers and Co. and Aquilino Power formerly, now the succession of Don Geronimo Landrau, Don Manuel Cerecedo and Don Ulises Garcia Salgado, now Don Rafael Ortiz, on the south by the succession of Don Julio O'Neill Don Francisco Garcia and Don Jose Jesus Pesquera, and on the west the Farm Rentas, Mauricio de los Santos and Modesto Ortiz de Tejada.

2. That it — not yet registered at the Registry of Property and that the interest which Don Rafael Gutierrez del Arroyo owns therein was acquired by him, part by inheritance and part by purchase from other parties in interest; that the interest owned by Doña Dolores Gutierrez del Arroyo, was acquired by her by inheritance from her father and the interest owned by Mr. Robert Graham was acquired by him by purchase from Dona Felicia Fernandez.

3rd. That said property with the exception of certain parcels of 57 and 13 cuerdas lying west thereof, which are the object of this contract and the boundaries of which are very well known to the contracting parties is held under lease by Don Francisco Robledo.

4. That the Gutierrez del Arroyo brothers, have agreed to lease to Mr. Graham, the said parcels of land in said property, that is, of 57 and 13 cuerdas, and to that effect they have covenanted as follows:

First. Don Rafael Gutierrez del Arroyo in his own right and by virtue of the power granted him, does hereby make lease unto the other party hereto Mr. Robert Graham, of two parcels of land in the above described property, one of 57 cuerdas and the other of 13

cuerdas which parcels of land are known to both parties and they have well defined.

Second. The lease shall be for the term of three years from this date and therefore it shall expire on the same day and month of the year 1912.

Third. The amount of the lease or rent shall be \$185 for the first year and \$217.50 the rest, to be paid in quarterly installments due.

Fourth. The actual taxes levied upon the parcels of land under lease shall be paid by the owners in proportion to their respective interests, but should any increase be made thereon, the excess shall be paid by the lessee Mr. Graham.

Fifth. The actual improvements on the parcels of land leased shall remain to the benefit of the owners thereof upon the expiration of the lease.

Sixth. Inasmuch as each of the contracting parties allege certain rights which are contradicted by the other, emanating from previous transactions, which might affect this lease, the parties hereto agree that this contract does not, make better or worse nor modify the value, scope and existence of such rights.

Seventh. Mr. Robert Graham accepts the present deed in all its parts as it is in accordance with what has been agreed.

Such is the deed which they execute and legalize and for the faithful performance of which they bind themselves at all times under the liabilities provided for in the law and they designate this city for all acts and proceedings which might arise therefrom.

Before the witnesses, without any legal disqualification, Mr. E. B. Wilcox and Don Felix Dordal, residents and neighbors of this city.

This deed having been read by the contracting parties and the witnesses, and the same being satisfactory, was signed by all.

Of the knowledge, age, condition, profession and residence of the contracting parties as well as to the contents of this public instrument, I the Notary give faith.

At this point, the parties agree that Mr. Graham, the co-owner and lessee shall not receive any part of the rent or lease. I again give faith—Graham—Rafael Gutierrez del Arroyo—E. B. Wilcox—Felix Dordal—Rubricated and signed.—F. de la Torre—there is an internal revenue stamp to the value of one dollar cancelled by the signature and seal of this notary.—It is a copy of the deed of its number on file in the general protocol of my notarial office of the corresponding year, and for delivery to Don Rafael Gutierrez del Arroyo, I issue the same on two sheets of paper of my special use. It is a true copy of the original, of which I give faith, in the City of San Juan, Porto Rico, on the same day, month and year of its execution.—F. A. de la Torre.

IV.

That a contract of lease was entered into between Francisco Robledo one of the respondents, and Rafael and Dolores Gutierrez del Arroyo, the other two respondents, on the 10th day of June, 1909 which reads as follows:

Number Ninety Seven.

In the City of San Juan, Porto Rico, on the 10th day of June 1908, before me, Francisco de la Torre y Garrido, Lawyer and Notary Public in this Island, with residence in the capital thereof. Appear Don Rafael Gutierrez del Arroyo, who claims to be 54 years old, married, property owner and resident of Bayamon, and Don Francisco Robledo y Garcia, who states that he is 34 years old, single, property owner and resident of Rio Piedras. Mr. Robledo y Garcia appears in his own right; and Mr. Gutierrez del Arroyo, both in his own right and as representative of his sister Doña Dolores Gutierrez del Arroyo, 75 years of age, widow, property owner and resident of Bayamon, whom he assures has granted him full powers to represent her in the present deed.

They have in my judgment the legal capacity necessary for the execution of the present deed of Lease of Rural Property, and set forth the following facts:

1. Mr. Gutierrez del Arroyo states that he and his constituent are the sole owners of the property described as follows: Farm called Pueblo Viejo Arriba, situated in the barrio of Pueblo Viejo in the District of Bayamon, bounded on the North by Don Manuel Dias Caneja, and Cerecedo Brothers & Co. and Aquilino Power, formerly, to-day the succession of Don Geronimo Landrau, Don Manuel Mercado and Don Ulises Garcia Salgado, now Don Rafael Ortiz; On the south by the succession of Don Julio O'Neill, Don Francisco Garcia and Don Jose Jesus Pesquera, and on the west by the farm Rentas, Mauricia de los Santos and Modesto Ortiz de Tejada. That according to its title said property contains from 700 to 800 cuerdas; but that he believes that it contains a larger area.

2nd. That it has not been yet registered in their favor in the Registry of Property; and that the interest which the party hereto owns in the same was acquired by him partly as inheritance and partly by purchase of other parties in interest, and the interest owned by his constituent came to her by inheritance from her father.

3rd. That they have agreed to lease said property to the other party hereto Mr. Robledo Garcia, excluding one parcel on the West which they have agreed to sell to Mr. Robert H. Graham, and another small parcel on the South which Mr. Arroyo reserves for himself.

This agreement is entered into under the following conditions: First Don Rafael Gutierrez del Arroyo, in his own right and in pursuance to the powers conferred upon him, does hereby lease unto Don Francisco Robledo y Garcia the said farm "Pueblo Viejo Arriba" with the exception of the two mentioned parcels, known to both parties as already determined by them.

Second. The lease is made upon the basis that the farm to be leased, excluding the two parcels referred to, shall contain an area of 800 cuerdas more or less, to which the lessee shall be entitled

40 it being expressly understood that if there should be a difference of 50 cuerdas no claim shall be made between the parties, but any excess from the amount, over the 800 cuerdas, or shortage exceeding from said 50 cuerdas, to make up the said amount, shall cause a proportional increase or diminution in the rental as hereinafter fixed. For the above purposes there shall be made before six months a survey of the property and of the segregated parcels as well, and the parties hereto mutually designate Mr. Armando Morales to make said survey.

Third. The lease shall last six years beginning the first day of July next, which term may be extended at the will of the lessee, for two additional years, provided that he shall notify the lessor six months prior to the expiration of the lease, of his intention to so extend the said lease.

Fourth. The rental or price of the lease shall be: Three thousand dollars the first year; three thousand five hundred dollars the second year; four thousand five hundred dollars the third year; another four thousand five hundred dollars the fourth year; the same amount of four thousand five hundred dollars the fifth year, five thousand dollars the sixth year, and the two years of extension, should the lessee exercise that right, as he is entitled to, four thousand five hundred dollars each year. The payments of these rents shall be made semi-annually in advance.

Fifth. The actual taxes imposed upon the leased property shall be paid by the owners thereof, but should they be increased during the life of this contract, the excess shall be paid by the lessee.

Sixth. The lessee may use the leased property for the planting of sugar cane and other products and also for pasture; but he binds himself to maintain the dwelling house on the property and a small house near the switch in the same condition as they are now. The standing crops on the property now belong to the lessee by purchase from the owner, therefore they remain at his disposal.

Seventh. The fixing and enlargement of the sidetrack on the property shall be on account of the lessee, and this and other improvements as well as the ratoons which may exist in the property at the expiration of the lease shall remain to the benefit of the owners.

Eight. In case of sale of the leased property prior to the expiration of the lease, the owners thereof bind themselves to require from the purchaser that he shall respect this contract fully.

Nine. Don Francisco Robledo y Garcia accepts this contract in full as it is in accordance with the agreement.

Such is the deed which they execute and legalize and which the parties agree to abide by at all times under the liabilities provided by law, designating this city for all acts and proceedings which might arise thereunder.

There were witnesses without legal disqualification to act as such, the residents of this city Don Felix Dordal and Don Jesus Gimenez.

After the reading of the present by me, the notary, to the parties hereto, and the witnesses, they having waived that right of which

they were informed, it having been found satisfactory they signed the same together with the witnesses aforesaid.

I the Notary give faith as to the knowledge, age, condition profession and vicinity of the contracting parties as well as of the contents of this instrument. Rafael Gutierrez del Arroyo—Francisco Robledo—Felix Dordal—Jesus Jiminez—Signed—F. de la Torre. There is affixed the required internal revenue stamp.

This is a copy for Don Francisco Robledo y Garcia of the deed of its number on file in the general protocol of my notarial office of the corresponding year, which I issue on two sheets of paper of my private use with the following correction—Erased—~~ea~~.

It is a true copy of the original of which I certify in the City of San Juan, Porto Rico, on the same day, month and year of its execution—F. A. de la Torre.

41 but the court finds as a fact that Robledo entered into said lease with full notice of the existing contract of sale between Graham and Guierres del Arroyo.

V.

That the following correspondence at various dates was had between the complainant Graham and the respondent Rafael Gutierrez del Arroyo: First a letter from Mr. Graham to said Arroyo, (marked defendant's exhibit B) which reads as follows:

PUEBLO VIEJO, July 24th, 1909.

Sr. Don Rafael Arroyo, Bayamon, P. R.

DEAR MR. ARROYO: As I feared, I find that we are likely to have trouble over this land question. I have found Francisco Sevilla has plowed and planted part of the 70 acres you contracted to sell to me. Also that Mr. Robledo has not had a clear understanding of my rights in the matter. I have forbidden Sevilla to continue and told Mr. Robledo I shall insist on the terms of the contract. Don Antonio A. Nava, has asked me not to take further action until he can have all the people interested meet at his office. I agreed if the meeting was not delayed too long to wait. Also before the meeting I wish to know if you will meet me on the property to place stakes or boundary marks upon the property so that we avoid further trouble. Believe me a settlement of these things according to your original promise will be greatly to your advantage, as any unnecessary expense put upon the purchaser has to be considered in the price paid for the land mentioned in clause No. 3.

Also I am very sorry to say that we will be compelled to ask for a prompt decision because delay can now serve no useful purpose for any person interested.

Yours respectfully,

(Signed)

ROBT. GRAHAM.

Second. A letter (complainant's exhibit B) which reads as follows:

ROBERT GRAHAM.

SAN JUAN, P. R., April 27th, 1908.

Mr. Robert Graham, Present.

MY DEAR SIR: In my own name and in that of my sister, Doña Dolores, I authorize you to sell, in accordance with conditions agreed, the part of our finca at Pueblo Viejo, which is bounded on the east between Mr. Wilson and Don. Fco Cerecedo and which other boundaries are agreed with you.

I cannot state with certainty the extension of this part of the finca, which must be from two hundred to three hundred cuerdas.

I must explain that as a lease contract of the finca is still pending, I cannot undertake to deliver same until the expiration of that contract, which will take place within one year. This is no obstacle to the present realization of the sale, the delivery of the thing sold being subject to the fulfillment of the lease contract.

Yours truly,

(Signed)

RAFAEL G. R. DEL ARROYO.

42 Third. A letter (complainant's exhibit C.) which reads as follows:

SAN JUAN, P. R., Sept. 1, 1909.

Mr. Rafael Gutierrez del Arroyo, Bayamon, P. R.

SIR: The object of this letter is to formally offer you to purchase the parcel of land of 70 or 75 cuerdas at the rate of \$40.00 per cuerda and another parcel of 14 cuerdas at the rate of \$50.00 per cuerda, and that portion of another parcel of 200 or 300 cuerdas bounding with the American Railroad Company on the North, and with lands of Francisco Cerecedo on the northeast and east. Said portion of said parcel being the 100 cuerdas lying nearer to the railroad line referred to at the rate of \$55. per cuerda. All of which is mentioned and described in the contract subscribed by yourself and the undersigned in the city of San Juan, Porto Rico, on the 5th of July 1906. And I hereby offer to pay you the full amount which the value of the different parcels of land mentioned represent, at the particular price fixed in each case.

Yours truly,

(Signed)

ROBERT GRAHAM.

P. S.—It being understood that the said parcels of land shall be measured and the payment thereof shall be based upon said measure, it being also understood that I offer you in this act the amount represented by the value of each parcel based on an estimate of the maximum number of cuerdas mentioned in the contract of sale signed by us on the 5th of July 1906.

Vale.

ROBERT GRAHAM.

VI.

That the complainant Mr. Graham has obtained the title to the undivided part of the property in litigation from the co-owner of it, one Felicia Fernandez, in consideration of the sum of Eight hundred dollars, which sum was duly paid by said Graham.

VII.

That at the time of the making of the agreement of the 5th of July 1906, there was in existence a contract or lease between the respondents Gutierrez del Arroyo and one Landrau, which contract of lease said Landrau refused to rescind until the end of its term, which term has now expired.

VIII.

That Francisco Robledo, the third respondent herein, after making the lease above referred to with the other respondents, 43 has ~~has~~ plowed one half of the parcel 3 mentioned in the agreement of the 5th of July 1906, and which was included in the land leased to him by the other respondents and that he also planted five acres thereof in cane.

IX.

That some time after the lease was made between the Robledo and the Gutierrez respondents, Mr. Graham, seeing Robledo at work at the said third parcel, warned him that he, Mr. Graham, has a contract to purchase said lands and that then Robledo stopped in further cultivating the said parcel.

X.

That the contract of the 5th of July 1906, between Robert Graham and Rafael and Dolores Gutierrez del Arroyo, and the contract of lease made between Francisco Robledo and Rafael and Dolores Gutierrez del Arroyo, were drawn in the office of the same lawyer, to wit: Antoni Alvarez Nava.

XI.

That the boundaries of the three parcels, or their extent, were never measured or surveyed.

XII.

That the said contract of purchase was by said Graham transferred to the Graham and Granger Company of which Graham is a member, without profit to Graham; that is to say, that said agreement to purchase was transferred at the prices fixed therein for said land.

XIII.

That some time before bringing this suit, Mr. Graham offered to the respondents Gutierrez, the sum of three thousand (\$3,000.) dollars in payment for the two smaller parcels, but did not, at the same time, offer the transfer to them of the undivided share in the ownership of the land which he acquired from Felicia Fernandez, nor did the said Rafael Gutierrez del Arroyo at that time make demand for the same.

May 17, 1910.

(Signed)

B. S. RODEY.

Final Decree.

(Filed May 18, 1910.)

#672. Equity.

In the District Court of the United States for Porto Rico.

ROBERT GRAHAM, Complainant,

v.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES DEL
ARROYO, and FRANCISCO ROBLEDO, Defendants.*Final Decree.*

This cause came on for trial in open Court on February 23, 1910 all of the parties being present by their respective solicitors, proof was heard on the issues involved and the cause was submitted for final decision.

And it appearing to the Court that this is a suit for the specific performance of a contract entered into on the 5th day of July, 1906, between the complainant Robert Graham and the defendants, Rafael Gutierrez del Arroyo, wherein the said defendants, for a proper consideration promised and agreed to sell to the complainant three certain tracts of land hereinafter described; and it appearing that the defendant Francisco Robledo is in the possession of and holds a lease from the defendants Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo to one of the said tracts of land, to wit: the largest of said tracts, which lease was executed by the parties thereto with notice of the rights and interests of the complainants herein in and to said tract of land, and the said defendants Rafael and Doña Dolores Gutierrez del Arroyo having refused to execute a deed transferring said land to complainant, notwithstanding said Graham has tendered to said defendants the purchase price thereof; and now all of the conditions of said contract having been complied with by the complainant, the said Robert Graham, and a specific performance being prayed, the court having duly considered all of the evidence in said cause, and being fully advised in the premises, all of which more fully appears in the opinion sent
45 by the Court to the files herein on May 7th, 1910, and the findings of fact this day signed by the Court, now

Therefore, it is hereby ordered adjudged and decreed that the said contract entered into on the fifth day of July 1906 is in full force and effect as executed, and that the same be executed by the parties thereto specifically as agreed, with this modification, to wit: that as the said tracts of land covered by the said contract of purchase, are indefinite as to the exact acreage in each tract, as well as more or less indefinite as to the boundaries thereof, and the court having ordered a survey of the premises by the surveyor Armando Morales whose appointment was accepted by all of the parties hereto, and the said surveyor having reported to the Court the results of said

survey which survey is at this time approved, the said defendants are hereby directed to execute and deliver to the complainant a good and sufficient deed or deeds to the said parcels of land as the same are herein described and the said Robert Graham in his behalf is directed and required to pay for the same at the price per cuerda in said contract of sale set forth, and at the time and under the conditions therein stated, the said tracts of land being described as follows to wit:

Parcel No. 1.

Beginning at a point situated on the Eastern side of the creek existing between the lands of this property and those of Mr. Graham, from this point along the said eastern boundary of the said creek:

61.07 centesimal grades and	56.79 meters,
11.38 " "	113.98 "
51.08 " "	10.70 "
396.44 " "	55.73 "
17.63 " "	166.60 "
344.92 " "	100.96 "
347.03 " "	47.76 "
99.68 " "	37.97 "
361.18 " "	93.89 "

Hence along the boundary line of the lands of Mr. Graham;

183.45 centesimal grades and	44.22 meters,
137.19 " "	412.44 "

46

56.01 centesimal grades and 368.83 meters, from the right of way of the railroad line along this right of way through the edge of the embankment.

101.96 centesimal "	223.85 "	Thence along the boundary line with other lands of the Succession of Gutierrez del Arroyo.
---------------------------	----------------	--

198.98 " "	142.01 meters
257.23 " "	346.29 "
274.54 " "	239.14 "
259.80 " "	319.23 "
345.37 " "	176.04 " up to the point of beginning.

Which perimeter contains an area of 27 hectares, 19 ares, and 27 centiares, equivalent to 69 13/100 cuerdas of the old measure.

Parcel No. 2.

Beginning at a point situated on the eastern side of the right of way of the American Railroad Company along the line of this right of way:

76.58 centesimal grades and 111.70 meters. Thence following up

stream the current of the creek Barraco, which is the boundary line of the lands of Mr. Cerecedo;

185.49	"	"	209.00	"
161.33	"	"	269.80	"
179.68	"	"	262.10	"
194.48	"	"	185.20	"
172.60	"	"	193.70	"
229.67	"	"	189.60	"

up to the point where Barraco creek ends. Thence also along the boundary line of lands of Mr. Cerecedo, at which point the boundary line with Cerecedo ends and that of Mr. Wilson begins the parcel in dispute.

199.38	"	"	90.02	"
--------	---	---	-------	---

297.92	"	"	162.40	"
308.27	"	"	129.53	"
279.38	"	"	15.99	"
335.23	"	"	214.63	"
319.33	"	"	71.27	"
301.65	"	"	105.54	"

Thence along the boundary line with the lands of the Succession Gutierrez del Arroyo;

391.00	"	"	509.84	"
330.92	"	"	174.42	"

up to the western bank of the Margarita creek. Thence along this bank down stream. Thence following again the boundary line with lands of Succession Gutierrez del Arroyo.

47

48 29 centesimal grades and 689.07 meters up to the point of beginning.

Which perimeter contains an area of 91 hectares, 53 ares y 7 centiares equivalent to 232 87/100 cuerdas of the old measure.

Parcel No. 5.

Beginning at a point situated on the Northern side of the right of way of the American Railroad Company and following the boundary line of Mr. Canejas, with:

57.31	centesimal grades and 243.51 meters			
121.42	"	"	50.31	"
131.55	"	"	106.19	"
99.40	"	"	81.21	"
157.58	"	"	16.79	"
98.82	"	"	64.71	"
123.16	"	"	68.56	"
105.04	"	"	99.27	" up to the western side of the road from Guainabo to Cataño and following this side of said road with:
200.26	"	"	43.99	" up to the Northern side of the right of way of the railroad line and following this side with
299.77	"	"	558.82	" and
303.60	"	"	92.03	" up to the point of beginning.

Which perimeter contains an area of 5 hectares, 46 ares and 57 centiares equivalent to 13 91/100 cuerdas of the old measure.

And it is further ordered, adjudged and decreed that the said Francisco Robledo leased from the said Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo the said tract of land set forth in the findings of fact herein with full notice of the rights of complainant Robert Graham, therein and that because thereof, he the said Robledo is not entitled to the use or occupation of said land as against the right of said Graham to purchase and enter upon the possession of the same, and the said lease made and executed by the said Rafael and Doña Dolores Gutierrez del Arroyo to the said Francisco Robledo, is, so far as the same may interfere with the right of purchase by said Graham, hereby declared to be null and void.

It is further ordered, adjudged and decreed that in the event that the said Rafael Gutierrez del Arroyo and Doña Dolores del Arroyo shall fail or refuse to execute the deeds as in this decree heretofore directed within sixty days from the filing hereof, that then, in that event the clerk of this court shall be and he hereby is authorized and directed to execute said deed or deeds in the name, place and stead of Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo and to deliver the said deeds to the said Robert Graham (provided he has complied with the terms and conditions imposed upon him by the contract) and the said deed thus executed and delivered shall have the same force and effect as if the same had been executed by the said Rafael and Doña Dolores Gutierrez del Arroyo, and to that end the clerk is further authorized to employ a notary and to tax the expense of the proper execution of said deeds against the said defendants Rafael and Dolores Gutierrez del Arroyo, as costs necessarily incurred in this action, and for which execution may issue.

And it is further ordered, adjudged and decreed that the lease executed by Rafael and Doña Dolores Gutierrez del Arroyo, and which is set forth in full in the Findings of Fact herein, was executed by said defendants and the complainant herein with the full understanding and agreement that the same should not in any manner interfere or affect the contract of purchase also set forth in said Findings, and that the said lease was an agreement of a temporary character, executed by the parties only because of the delay in consummating the sale now decreed to be executed.

It is further ordered, adjudged and decreed that the complainant Robert Graham, execute and deliver to the defendants, Rafael and Doña Dolores Gutierrez del Arroyo, the undivided interest he purchased from Felicia Fernandez as to that portion of the entire estate that remains in the possession of said Rafael and Doña Gutierrez,

49 after the latter have deeded to said Graham the land heretofore described herein, the said Graham to be allowed on account of his payment for the land purchased by him, the proper relative portion of what he paid for said Felicia's undivided interest in the portion that remains to said defendants.

It is further ordered and decreed that the complainant herein have and recover of and from the defendants and each of them his costs in this behalf expended or incurred to be taxed by the Clerk of the Court and for which execution may issue.

(Signed)

B. S. RODEY, Judge.

Signed in open Court this 18th day of May, 1910.

50

Petition for Appeal.

Filed May 18, 1910.

In the District Court of the United States for Porto Rico.

Equity. #672.

ROBERT GRAHAM, Complainant,

vs.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLED, Respondents.

Petition for Order Allowing Appeal.

To the Honorable Bernard S. Rodey, District Judge of the above-named Court residing therein:

The above named respondents in the above entitled cause, conceiving themselves aggrieved by the order and decree made and entered by the above named Court in the above entitled cause, under date of May 18, 1910, do hereby appeal from the said order and decree to the Supreme Court of the United States for the reasons specified in the Assignment of errors filed herein, and the respondents pray that this appeal may be allowed, and that a transcript of the

record, papers, and proceedings upon which said order and decrees were made, duly authenticated, may be sent to the Supreme Court of the United States, and these respondents pray that an order be made fixing the amount of security which these respondents shall give and furnish upon such appeal, and also the amount of security which these respondents shall give and furnish as supersedeas, and that upon the giving of the last named security all further proceedings in this court be suspended and staid until the determination of said appeal by the said United States Supreme Court.

And your petitioners will ever Pray.

(Signed)

C. M. BOERMAN,
Solicitor for Respondents.

51

Assignment of Errors on Appeal.

(Filed May 18, 1910.)

In the District Court of the United States for Porto Rico.

Equity. #672.

ROBERT GRAHAM, Complainant,

VS.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLEDÓ, Respondents.

Assignment of Errors.

Now come the respondents and file the following Assignment of Errors upon which they and each of them will rely:

First. That the United States District Court of Porto Rico erred in holding that the contract between the complainant Graham and respondents Gutierrez del Arroyo was a deed of sale and not a contract of an option of sale.

Second. That the Court erred in not holding that a reasonable time has passed for the complainant to make use of such option and that he, within that reasonable time, did not do so.

Third. That the Court erred in not holding that the complainant, by his conduct, to wit: by entering into a contract of lease with the said respondents for the parcels which he claims to have been sold to him, has waived his right of purchase as against the respondents concerning said parcels so leased by him.

Fourth. That the Court erred in holding that the respondent Francisco Robledo, who for valuable consideration and in good faith has made a contract of lease with the other two respondents, can be deprived of his rights acquired by such lease.

Fifth. That the Court erred in not holding that a reasonable compensation, for his work and labor and expenses had in behalf of the premises leased by the said Robledo from the other respondents, shall be rendered to him by the complainant.

Sixth. That the Court erred in entering a final decree therein in

favor of the complainant and against the respondents, Rafael and Dolores Gutierrez del Arroyo.

Seventh. That the Court erred in entering a final decree therein in favor of the said complainant against the respondent Francisco Robledo.

Eighth. That the Court erred in not dismissing the said suit and entering a final decree therein in favor of the respondents.

(Signed)

C. M. BOERMAN,
Solicitor for Respondents.

53

Order Allowing Appeal.

Filed May 18, 1910.

Equity. #672.

ROBERT GRAHAM, Complainant,

vs.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLEDO, Respondents.

Order Allowing Appeal.

On motion of Charles S. Boerman, Esq, solicitor and of counsel for the respondents, it is ordered that an appeal to the Supreme Court of the United States, from the final decree heretofore filed and entered herein, be and the same hereby is allowed, and that a certified transcript of the record and of all proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

It is further ordered that the cost bond on appeal be fixed at the sum of three hundred dollars and in case of supersedeas, the same bond shall be fixed at the sum of five thousand (5000) dollars the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated, May 18, 1910.

(Signed)

B. S. RODEY,
District Judge.

54

Appeal Bond.

(Filed May 18, 1910.)

In the District Court of the United States for Porto Rico.

Equity. No. 672.

ROBERT GRAHAM, Complainant,

vs.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO, and FRANCISCO ROBLEDO, Respondents.

Know all men by these presents, that we, Rafael Gutierrez del Arroyo, Doña Dolores Gutierrez del Arroyo and Francisco Robledo,

as principals, and Don Fidel Guillermety and Don Fernando Montilla as sureties, are held and firmly bound unto Robert Graham in the full and just sum of Three hundred Dollars, to be paid to said Robert Graham, his attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18 day of May, in the year of our Lord One Thousand Nine Hundred and Ten.

Whereas, lately at a session of the United States District Court for Porto Rico, in a suit pending in said Court between Robert Graham, complainant, and Rafael Gutierrez del Arroyo, Doña Dolores Gutierrez del Arroyo and Francisco Robledo, respondents, a decree was rendered against the said Rafael Gutierrez del Arroyo, Doña Dolores Gutierrez del Arroyo and Francisco Robledo, respondents, and the said Rafael Gutierrez del Arroyo, Doña Dolores Gutierrez del Arroyo and Francisco Robledo, having obtained from said Court an order allowing an appeal to the Supreme Court of the United States to reverse the decree of the aforesaid suit, and a citation directed to the said Robert Graham is about to be issued citing and admonishing

him to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia.

Now, the condition of the above obligation is such that if the said Rafael Gutierrez del Arroyo, Doña Dolores Gutierrez del Arroyo, and Francisco Robledo shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

(Signed) DOLORES GUTIERREZ DEL ARROYO.
RAFAEL GUTIERREZ DEL ARROYO.
FRANCISCO ROBLEDO.
F. GUILLERMETY.
F. MONTILLA.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

Don Fidel Guillermety, being duly sworn says: that he is a freeholder and that he is worth One Thousand Dollars over and above all his legal debts and liabilities.

(Signed) F. GUILLERMETY.

Signed and sworn to before me, this 18 day of May, 1910.

(Signed) F. DE LA TORRE,
Notary Public.

56 UNITED STATES OF AMERICA,
District of Porto Rico, ss:

Don Fernando Montilla being duly sworn, says: that he is a freeholder and that he is worth One Thousand Dollars U. S. Money over and above all his legal debts and liabilities.

(Signed) F. MONTILLA.

Signed and sworn to before me, this 18 day of May, 1910.

(Signed)

F. DE LA TORRE,
Notario Publico.

Approved 5/18/10.

(Signed) B. S. RODEY.

57 *Return on Service Writ.*

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I hereby certify and return that I have served the annexed Citation on the therein-named Robert Graham by handing to and leaving a true and correct copy thereof with Him personally at San Juan in said District on the 20th, day of May, A. D. 1910.

H. S. HUBBARD,
U. S. Marshal.
T. G. BARRETT, *Deputy.*

58 *Citation.*
#945.

UNITED STATES OF AMERICA, ss:

The President of the United States to Robert Graham, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, in the District of Columbia, within sixty days from the date of this writ, pursuant to an appeal filed in the clerk's office of the United States District Court for Porto Rico, wherein Rafael Gutierrez del Arroyo, Doña Dolores Gutierrez del Arroyo and Francisco Robledo are appellants and plaintiffs in error and you are appellees and defendant in error, to show cause, if any there be, why the judgment or decree in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court of America, this 18th day of May, A. D. 1910, and of the independence of the United States the one hundred and thirty fourth.

B. S. RODEY,
United States District Judge
for the District of Porto Rico.

[Seal United States District Court for the District of Porto Rico.]

Attest:

JOHN L. GAY, *Clerk.*

[Endorsed:] #672. Equity. In the District Court of the United States for Porto Rico. Robert Graham vs. Rafael Gutierrez del Arroyo, et al. Citation. Filed Clerk's Office, United States District Court. May 20, 1910. John L. Gay, Clerk of the Court. C. M. Boerman, Attorney. H. M. Hill, deputy. Marshal's Fees. Service. \$2.00 Expenses.

Præcipe for Record.

(Filed May 24, 1910.)

United States District Court for Porto Rico.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO et al.

The Clerk will please prepare and transmit the record to the U. S. Supreme Court, and include therein:

1. All the pleadings in the case with their amendments.
2. The findings of fact.
3. The Final decree, opinion and any other decision of the Court in this case.
4. Petition for appeal.
5. Assignment of errors.
6. Order allowing appeal.
7. Appeal bond.
8. Citation.

(Signed)

C. M. BOERMAN,

Attorney and Solicitor for Respondents Appellants.

60 In the District Court of the United States for Porto Rico.

In Equity. No. 672.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES GUTIERREZ DEL ARROYO and FRANCISCO ROBLEDÓ.

I, John L. Gay, Clerk of the District Court of the United States, in and for the District of Porto Rico, do hereby certify the foregoing fifty-nine typewritten pages, numbered from 1 to 59, inclusive, to be a true and correct copy of the record and proceedings in the above entitled cause as the same remains of record in my office as called for by the præcipe of the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this twenty-ninth day of June, A. D., 1910, at San Juan, Porto Rico.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,

Clerk District Court of the United States for Porto Rico.

[Endorsed:] No. 672. In the District Court of the United States for Porto Rico. Robert Graham vs. Rafael Gutierrez del Arroyo et al. Record on Appeal.

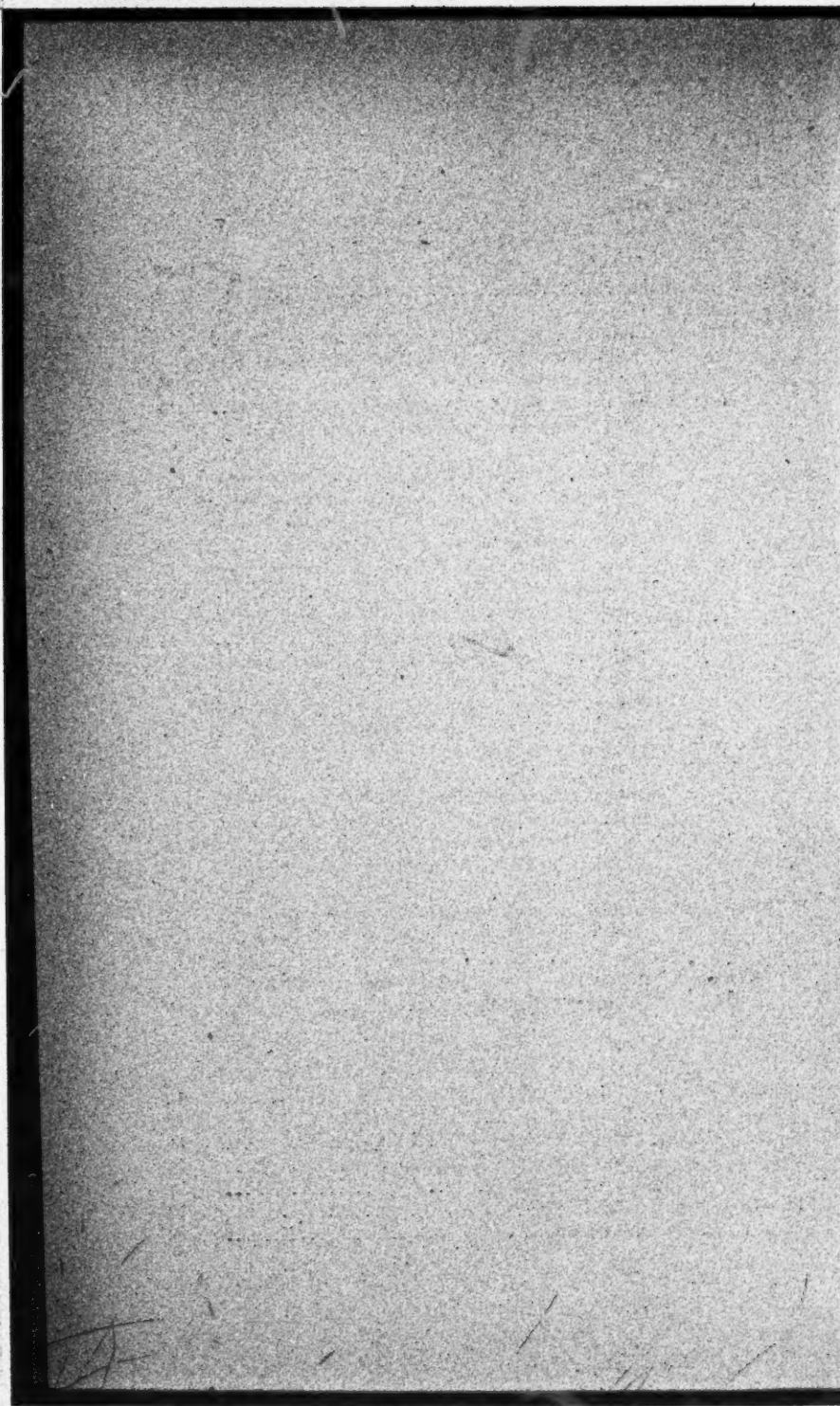
Endorsed on cover: File No. 22,308. Porto Rico D. C. U. S. Term No. 129. Rafael Gutierrez del Arroyo, Doña Dolores Gutierrez del Arroyo and Francisco Robledo, appellants, vs. Robert Graham. Filed August 30th, 1910. File No. 22,308.

SUBJECT INDEX.

	Page
Brief and argument.....	1
Exhibits:	
Exhibit A—Judicial sale. Deed from clerk of the United States district court for Porto Rico to Robert Graham, July 6, 1911.....	15
Exhibit B—Motion for writ of possession, filed July 20, 1911..	29
Writ of possession, with service thereto, filed July 28, 1911.....	29
Petition for rule to enforce compliance with court's decree of April 4, 1911, filed November 20, 1911..	31
Certified copy of order for rule, with service thereto, filed November 23, 1911.....	36
Order to show cause, with service thereto, filed November 28, 1911.....	39
Certified copy of order to show cause, with service thereto, filed February 6, 1912.....	41
Petition for appraisalment of waste, filed February 12, 1912.....	44
Decree. Journal entry of June 10, 1912 (entered as of and for the 30th day of March, 1912).....	47
Petition for order to execute release, filed June 11, 1912.....	48
Order for execution of release, filed June 13, 1912..	51
Order and amended order for cancellation of mortgage, filed July 1, 1912.....	54, 55
Certificate of clerk of United States district court for Porto Rico.....	58
Exhibit C—Certified copy of opinion of judge of the United States district court for Porto Rico, rendered March 30, 1912.....	59
Exhibit D—Translation of total release and cancellation of mortgage, July 5, 1912.....	65

LIST OF CASES CITED.

Dakota County vs. Glidden, 113 U. S., 277.....	12
Embry vs. Palmer, 107 U. S., 3.....	12
Erwin vs. Lowry, 7 Howard, 172.....	11
Gregg vs. Forsyth, 2 Wall., 56.....	13
O'Hara vs. McConnell, 93 U. S., 150.....	11
Raynes vs. Dumont, 130 U. S., 354.....	12
United States vs. Dashiell, 3 Wall., 688.....	12



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 129.

**RAFAEL GUTIERREZ DEL ARROYO ET
AL., APPELLANTS,**

vs.

ROBERT GRAHAM.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR PORTO RICO.**

**BRIEF AND ARGUMENT OF APPELLANTS IN OPPOSI-
TION TO MOTION TO DISMISS APPEAL.**

Appellants, as grounds for opposition to the motion to dismiss the appeal filed herein by appellee, allege and aver that the acts set forth in the motion to dismiss, and which are relied upon by appellee, do not constitute a waiver of their appeal, because:

First.

Appellants were compelled and coerced by the decrees and orders of the court below to act as they did and to comply with the decree rendered in the court below. Not being able to give a supersedeas bond to suspend the execution of said decree, appellants were unable to avoid compliance therewith and with various arbitrary and illegal orders made subsequent thereto, all of which are set forth in exhibits which are filed in support of this brief, such exhibits being contained in a certified copy of the proceedings in the court below subsequent to the rendition of the final decree.

Second.

Appellee should not be permitted to take advantage here of his own conduct in demanding and obtaining from the court below the arbitrary and summary orders under which appellants were compelled, under penalty of contempt of court, to partially execute the decree rendered herein.

Appellants, in support of this brief and argument, submit four exhibits, as follows:

A. Copy of notarial deed executed by Rafael Guillermet, "as clerk" of the District Court of the United States for Porto Rico, transferring to appellee the property the object of this suit, in accordance with the final decree rendered therein,

appellants having refused to comply with said decree.

B. A certificate from the clerk of the District Court of the United States for Porto Rico, setting forth various proceedings which took place subsequent to the final decree, among which are various orders of the court below coercing and compelling appellants to execute the decree, under penalty of contempt. These orders will be referred to *seriatim* hereafter.

C. Copy of an opinion rendered by the court below on the 30th day of March, 1912, duly certified to by the clerk of the District Court of the United States for Porto Rico, which opinion was inadvertently omitted from Exhibit "B."

D. Copy of the notarial deed executed by Rafael Guillermety, clerk of the District Court of the United States, for Porto Rico, in favor of appellee, cancelling the mortgage which by the previous deed (Exhibit "A") had been created in favor of appellants to secure the decreed price of the largest tract, in accordance with the final decree and the said deed (Exhibit "A").

Appellants respectfully submit that these exhibits establish, not only ample legal justification for their action, as set forth in the motion to dismiss the appeal, but also demonstrate a series of summary, arbitrary, and illegal orders made after

4

the term had elapsed at which the final decree was rendered, without due process of law, and without the court below having jurisdiction in the premises, by reason of the jurisdiction over the case having been transferred to this court by the appeal therein having been previously taken.

The first ground of the motion refers to the action of appellants in accepting the proceeds of the two smaller tracts of land.

These tracts are referred to in the motion and final decree as *tracts 1 and 5*. They are identical with tracts 1 and 2 of the option contract of July 5, 1906. There is a slight difference in the areas of these tracts as expressed in the decree and the option contract.

At the outset, it is significant for the purposes of this motion that *appellants declined and refused to comply with the decree by executing a deed to appellee as therein ordered*, and that all of the proceedings hereinafter specified were had in the trial court after the appeal to this court had been perfected and the record on such appeal had been docketed here.

Because of their refusal so to do, the clerk of the court, under the terms of the decree, executed a deed in favor of the appellee on the 6th day of July, 1911 (Exhibit "A"). The second clause of this deed recites:

"That the said defendants, Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo have refused to execute the deed

“ or deeds, as directed by the said decree,
 “ within the sixty days from the filing of
 “ the same as is more particularly set forth
 “ in the said decree herein literally copied,”
 etc.

By referring to Exhibit “B” the following summary and arbitrary proceedings appear to have been taken in the court below subsequent to the decree and the perfecting of the appeal herein.

On the 20th day of July, 1911, appellee filed his petition in the court below for a writ of possession in the above suit directing the marshal of this court to deliver the possession of the two smaller tracts of land referred to in the final decree rendered herein, under the descriptions which appear in the deed of conveyance executed in compliance with the said final decree (Exhibit “B”).

On July 25, 1911, the marshal of the court makes his return, certifying that he has executed the said writ of possession “on the 24th day of July at Bayamon, P. R., by placing the within-named Robert Graham in possession of the within-described property, as herein I am commanded” (Exhibit “B”).

On July 22, 1911, the writ of possession was issued against appellants (Exhibit “B”).

On November 20, 1911, appellee filed a petition for a rule upon defendants (appellants herein) to show cause why they should not be punished for contempt for not aiding appellee in obtaining an inscription in the registry of property of the deed

executed to appellee by the clerk of the court in accordance with the terms of the decree thereof (Exhibit "B").

On November 23, 1911, the court issued an "order for rule" against appellant Rafael Gutierrez del Arroyo to appear before the court in chambers on November 25, 1911,

"to show cause, if any there be, why he has
"not obeyed and complied with the com-
"mand and direction of the final decree en-
"tered in the above-entitled cause, by ob-
"taining and presenting in the registry of
"property all such contracts, conveyances,
"and other documents as may be necessary
"to cause the deed in favor of the peti-
"tioner, executed under the order of this
"court, to be inscribed therein without de-
"fects, and why, for failure so to do, he
"should not be adjudged in contempt of the
"lawful order and process of this court and
"be punished accordingly" (Exhibit "B").

On November 28, 1911, the court made an order making the rule aforesaid peremptory, and holding appellant Rafael Gutierrez del Arroyo to be in contempt of the court "for failure to obey its lawful order and process" (Exhibit "B").

On December 5, 1911, appellant is released from the charge of contempt, and time is given him to comply with the order last above referred to (page 15, Exhibit "B").

On February 5, 1912, the marshal of the court made his return of service of the foregoing order, reciting that—

“ On the 3d day of February I delivered a
“ true copy of this writ to Rafael Gutierrez
“ del Arroyo at Bayamon, Porto Rico, and
“ placed Robert Graham, plaintiff herein,
“ in possession of the 220.70 cuerdas of
“ land, as described in the final decree in
“ this cause, and as herein I am com-
“ manded” (Exhibit “B”).

On February 12, 1912, appellee presented in the court below a remarkable petition setting forth that appellants had committed waste upon the large tract of land during the pendency of the litigation, and prayed that the court, after determining the amount in money of such waste, should deduct it from the price which, under its previous decree, appellants were awarded by the court therefor (Exhibit “B”).

On March 30, 1912, the court, sitting as a court of equity, and as a part and continuation of the cause, after having appointed an “appraiser” to investigate the waste and having received his report, without a trial or the intervention of a jury, rendered an opinion to the effect that—

“ In making payment to the respondents,
“ upon receipt of a conveyance, the com-
“ plainant will therefore be authorized to
“ retain from the consideration to be by
“ him paid for said conveyance, the sum of
“ \$4,000 in repayment for waste committed
“ by the respondents or their agents upon
“ the tracts of woodland here under consid-
“ eration, and \$103.34 on account of taxes
“ and surcharges, and it is so ordered; to

" which action of the court counsel for the
" respondents duly objected and excepted"
(Exhibit "C").

On June 10, 1912, the court entered its "decree"
adjudging and decreeing:

" Upon the *motion* filed herein, that the
" complainant, Robert Graham, will there-
" fore be authorized to retain from the con-
" sideration paid by him for the conveyance
" the sum of \$4,000 in repayment for waste
" committed by respondents or their agents
" upon the tracts of woodland here under
" consideration, and \$103.34 on account of
" taxes and surcharges, to which action of
" the court counsel for respondents duly ob-
" jects and excepts. This order is entered
" here as of and for the 30th day of March,
" 1912" (Exhibit "B").

On June 11, 1912, appellee, with a rare insist-
ence, again applied to the court for its aid in com-
pelling appellants to perform the decree and to
comply with the foregoing summary and arbitrary
orders. On this date he presented a petition in
which he recited that by the deed executed by the
clerk of the court, in accordance with the decree
thereof, the large tract of 222.70 cuerdas was con-
veyed to plaintiff, who gave a mortgage to defend-
ants for the decreed price, to wit, \$12,248.50;

That the court had allowed a reduction for waste
of \$4,000 from such decreed price;

That plaintiff had been subjected to certain ex-
penses because of the action of defendants;

That defendants refused to accept the difference between the decreed price of \$12,243.50 and the various amounts allowed by the court for waste and otherwise, and refused to execute a release of the mortgage aforesaid.

Plaintiff (appellee) prayed that defendants (appellants) be compelled to execute such release, and, in the event of their refusal to do so, that the clerk of the court should be authorized to execute such document (Exhibit "B").

On June 13, 1912, the court granted the foregoing petition and ordered defendants (appellants) to execute such release within two days thereafter. In the event of their refusal so to do, the clerk was authorized to execute such document (Exhibit "B").

On July 5, 1912, the clerk of the court, Rafael Guillermet, executed to appellee a notarial release of the mortgage, which, by the deed (Exhibit "A"), had been created in favor of appellants (see Exhibit "D").

The foregoing narration of events which transpired in the court subsequent to the final decree, discloses the duress and coercion to which appellants were subjected.

Upon refusal to execute the deed of the property to appellee, in accordance with the decree of the court, the latter directed the clerk of the court to do so. The price of the two small tracts, as fixed by the decree, was paid into the registry of the

court. A mortgage was created in the deed in favor of appellants. By successive orders of an arbitrary and summary character, appellants were deprived of the possession of the large tract, and the price therefor determined by the decree was summarily and arbitrarily reduced by an illegal reduction because of alleged waste.

Appellants were adjudged guilty of contempt of court for failing to aid appellee in obtaining an inscription in the Registry of Property of the deed executed under the mandate of the decree.

They were not able to give a supersedeas bond to stay the execution of the decree.

In the face of this situation, was there any alternative left to them for self-defense and protection?

They were not compelled to abandon whatever was left to them out of the wreck.

The situation which confronted them was brought about by the insistence of appellee to exact every possible benefit and advantage from the decree.

Appellee is in no position to complain of the action of appellants in temporarily or partially accepting the situation which was forced upon them and which they felt they dared not avoid, without exposing themselves to the penalties of contempt of court and great financial loss.

The following authorities are cited in opposition to the motion to dismiss:

In the case of *Erwin vs. Lowry*, 7 Howard, 172, this court, deciding a similar case, gave expression to the following principle:

"And we take the rule to be that, although a decree in equity is fully executed at the instance of the successful party, he cannot complain of his own voluntary acts, if he does perform a condition imposed upon him before he can have the fruits of the decree, although the other party derives a benefit from such performance. If it was otherwise a writ of error in such a case as the present, or an appeal in equity, might be defeated after the writ of error or appeal was sued out, where there was no supersedeas; and here there was none.

"Five years is the time allowed for prosecuting appeals to, and writs of error out of this court, and in many cases decrees and judgments are executed before any step has been taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree.

"If a judgment is reversed, it is the duty of the inferior court, on the case being remanded, to restore the parties to their rights."

In the case of *O'Hara vs. McConnell*, 93 U. S., 150, the court cited with approval the previous opinion in the case of *Erwin vs. Lowry*, *supra*, and held in this case that—

"The making of a conveyance as ordered by a decree does not deprive the defendant of the right of appeal."

See also *Raynes vs. Dumont*, 130 U. S., 354.

Embry vs. Palmer, 107 U. S., 3, is cited by appellee in support of the motion to dismiss, but it is thought that its true bearing is otherwise, as note the following:

"Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not, and never was, a bar to a writ of error where it appeared that the levy was made or the payment was received prior to the service of the writ, and there is no well considered case which affords the slightest support to any such proposition. *Subsequent payment, unless in full, would have no greater effect*, where the alleged satisfaction is not in full and was obtained prior to the writ of error, and authorities are unanimous that it does not impair the right of plaintiff to prosecute the writ."

Vol. 2, *Encyc. U. S. Supreme Court Reports*, pp. 181 and 182.

See also *U. S. vs. Dashiell*, 3 Wallace, 688.

Dakota County vs. Glidden, 113 U. S., 277, is also in point; *a. g.*:

"A defendant in an action of ejectment may bring a writ of error, and failing to give a supersedeas bond, may submit to the judgment by giving the possession of the land, which he can recover if he reverses judgment by means of a writ of restitution.

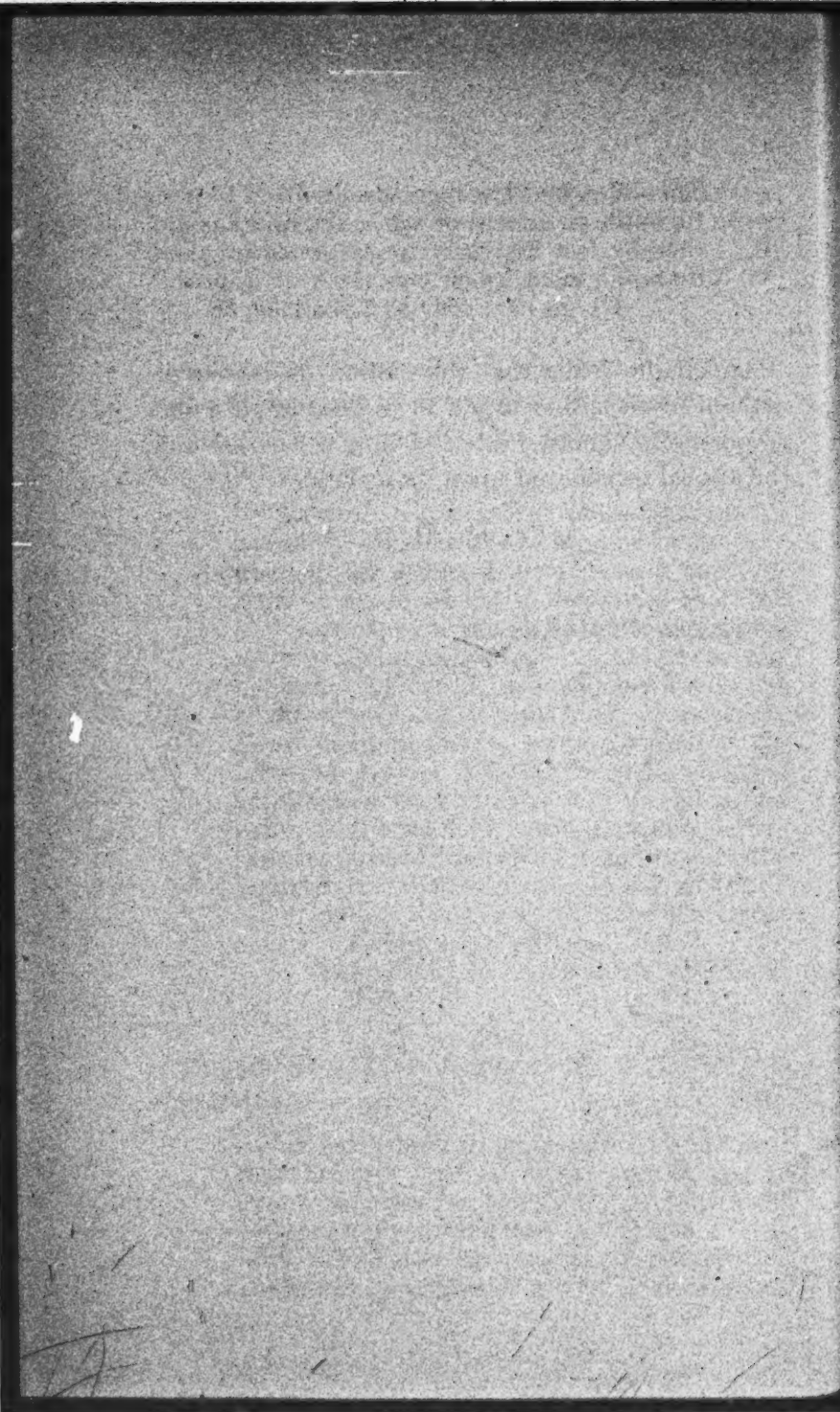
The defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal."

Gregg vs. Forsyth, 2 Wallace, 56.

Appellants insist that the motion to dismiss is without merit, either in law or in good morals, and respectfully submit that it should be denied and the appeal considered upon its merits.

FRANCIS H. DEXTER,
Attorney for Appellants.

FREDERIC D. McKENNEY,
Of Counsel.



"EXHIBIT A."

Frank Antonsanti, Abogado-Notario. Núm. 45. Escritura de Judicial Sale. Otorgada por Mr. Rafael Guillermety y Rosales, as Clerk of the United States District Court for Porto-Rico, to Mr. Robert Graham, en 8th de July de 1911. San Juan, Puerto-Rico.

NUMBER FORTY FIVE.*Judicial Sale.*

In the City of San Juan, Porto-Rico, on the sixth day of July, A. D. nineteen hundred and eleven, before me, Frank Antonsanti Capó, Attorney at Law and Notary Public with offices at number forty three, San Francisco Street, and duly licensed to practice throughout the Island; personally appeared; Rafael Guillermety y Rosales, as party of the first part, who is thirty one years of age, married, a Lawyer by profession and residing in this City, in his capacity as Clerk of the District Court of the United States for Porto-Rico, and Robert Graham, fifty four years of age, agriculturist, resident of Pueblo Viejo, Bayamón, and married to Mrs. May Wood Graham of forty four years, who also appears herein as party of the second part.

The said parties are personally known to me and in my judgment possess the necessary legal capacity for the execution of this deed, and the said Rafael Guillermety y Rosales, as Clerk of the District Court of the United States for Porto-Rico, party of the first part, states:

First: That at a regular term of the District Court of the United States for Porto-Rico held in and for said District on the fourth day of April, A. D. nineteen hundred and eleven, Robert Graham, the party of the second part hereto, secured a final Decree against Rafael Gutierrez del Arroyo, Dolores Gutierrez del Arroyo and Francisco Robledo, in a certain Bill in Equity for the specific performance of a certain con-

tract, by which the said Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo agreed to sell to the said Robert Graham three certain pieces of real estate, which said contract is as follows, to wit:

(In Spanish.)

"Memorandum."

"En la Ciudad de San Juan, Puerto-Rico, el dia cinco de Julio de mil novecientos seis, D. Rafael Gutierrez del Arroyo y Mr. Robert Graham, convienen:

1°. Don Rafael Gutierrez del Arroyo se compromete a vender a Mr. Robert Graham una extensión de su finca de Pueblo Viejo, que ambos contratantes tienen ya deslindada y que puede llegar a 70 ó 75 cuerdas á razón de \$40 la cuerda.—2°.—Igualmente se compromete a venderle otra pequeña cantidad de terreno, también por ellos deslindada y que puede tener una extensión aproximada de 14 cuerdas, a razón de \$50 cada cuerda.—3°.—Así mismo se compromete a venderle otras 200 ó 300 cuerdas de la misma finca en la parte de ella que de acuerdo también han designado, a razón de \$55 cada cuerda.—4°.—Las porciones indicadas en los número 1° y 2°, serán pagadas al contado. La porción indicada en el tercer número debe ser pagada en plazos dentro de los dos años siguientes al otorgamiento de la escritura. Mr. Graham no pagará interés por el precio aplazado, pero el señor Arroyo quedará en posesión y usufructo de la parte de la finca vendida y no pagada, hasta que el pago sea hecho. Mr. Graham dejará la finca hipotecada a la seguridad del pago.—5°.—Este contrato se entenderá en forma de escritura pública, tan pronto como Mr. Graham haya ultimado el negocio que hoy tiene pendiente con Doña Felicia Fernández sobre compra de un condominio en la misma finca. Si ese negocio no se llevare a efecto, también quedará sin valor ni efecto este contrato.—6°.—Este contrato queda también subordinado a la condición de que Don Rafael Gutierrez del Arroyo rescinda un contrato de arrendamiento que hoy tiene celebrado con D. Eleuterio Landrau (Firmados) Robt. Gra-

ham.—Rafael Gutierrez del Arroyo.—El dia 27 de Abril de 1908, los contratantes adicionan la cláusula 3a. de este contrato, en el sentido de que el exceso de precio que Mr. Graham obtenga sobre los \$55 por cuerda será repartido entre él y el señor Arroyo al 50%.—(Firmado) Robt. Graham.—Rafael Gutierrez del Arroyo.

Second.—That the said defendants Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo have failed to execute the deed or deeds as directed by said Decree within the sixty days from the filing of the same as is more particularly set forth in the said Decree herein literally copied:

"In the District Court of the United States for Porto-Rico.

"ROBERT GRAHAM, *Complainant*,

vs.

"RAFAEL GUTIERREZ DEL ARROYO, DOÑA DOLORES DEL ARROYO, and FRANCISCO ROBLEDO, *Defendants*.

"*Final Decree.*

"This cause came on for trial in open Court on February 23, 1910, all of the parties being present by their respective solicitors, proof was heard on the issues involved and the cause was submitted for final decision. And it appearing to the Court that this is a suit for the specific performance of a contract entered into on the 5th day of July, 1906, between the complainant Robert Graham and the defendants Rafael Gutierrez del Arroyo, wherein the said defendants, for a proper consideration promised and agreed to sell to the complainant three certain tracts of land hereinafter described; and it appearing that the defendant Francisco Robledo is in the possession of and holds a lease from the defendant Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo to one of the said tracts of land, to wit: the largest of tracts which lease was executed by the parties thereto with notice of the rights and interests of the complainants herein, in and to said tract of land and the said defendants Rafael and

Dña. Dolores Gutierrez del Arroyo having refused to execute a deed transferring said land to complainant, notwithstanding said Graham has tendered to said defendants the purchase price thereof; and now all of the conditions of said contract having been complied with by the complainant, the said Robert Graham, and a specific performance being prayed, the Court having duly considered all of the evidence in said cause and being fully advised in the premises, all of which more fully appears in the opinion sent by the Court to the files herein on May 7th, 1910, and the findings of facts this day signed by the Court, now therefore, it is hereby ordered, adjudged and decreed that the said contract entered into on the fifth day of July, 1906, is in full force and effect as executed, and that the same be executed by the parties thereto specifically as agreed, with the modification, to wit: that as the said tracts of lands covered by the said contract of purchase, are indefinite as to the exact acreage in each tract, as well as more or less indefinite as to the boundaries thereof, and the Court having rendered a survey of the premises, the surveyor A. Nin y Martínez, whose appointment was authorized by the Court, and the said surveyor having reported to the Court the results of said survey which survey is at this time approved the said defendants are hereby directed to execute and deliver to the complainant a good and sufficient deed or deeds to the said parcels of land as the same are herein described, and the said Robert Graham in his behalf is directed and required to pay for the same at the price per cuerda in said contract of sale set forth, and at the time and under the condition therein stated, the said tracts of land being described as follows, to wit:

PARCEL No. 1.—Table of Coördinates and Square Surface of Parcel No. 1, Sold by Rafael Gutierrez del Arroyo to Robert Graham:

Points.	Y.		Products.
A. B.	1814-76	141-46	256716-00
B. C.	1614-24	165-42	267027-00
C. D.	1369-62	37-67	51593-60
D. E.	1305-73	15-23	19886-30
E. F.	1239-23	20-12	24933-30
F. G.	1135-69	33-46	38000-20
G. H.	1043-54	17-06	17802-80
H. Y.	964-96	22-74	21943-20
Y. J.	904-38	7-67	6574-84
J. K.	665-64	226-98	151086-97
K. L.	248-31	160-22	39784-23
L. M.	89-02	14-79	1316-60
M. N.	142-65	78-18	11152-30
N. N.	161-36	20-07	3238-50
N. O.	172-62	29-93	5166-52
O. O.	171-00	44-08	7537-68
O. P.	209-50	74-93	15697-84
P. P.	233-47	62-44	14577-87
P. P.	210-20	39-88	8382-78
P. Q.	157-50	49-02	7720-65
Q. Q.	111-65	26-67	2977-71
Q. V.	79-56	44-50	3540-42
V. V.	18-43	48-18	887-96
V. V.	42-08	12-86	541-15
V. U.	435-40	227-25	98944-85
U. T.	1076-12	237-46	255535-46
T. S.	1421-92	4-73	6725-68
S. R.	1568-57	0-57	894-08
R. A.	1736-17	1-33	2309-11
		380719-71	951738-71
			380719-71
		28.	571018-91
		S.	285509-45

equivalent to 70-00 cuerdas of the new measure, of 4079-79 square meters.

(Signed)

A. NIN Y MARTINEZ.

PARCEL No. 2.—Table of Coördinates and Square Surface of Parcel No. 2, Sold by Rafael Gutierrez del Arroyo to Mr. Robert Graham:

Points.	X.	Y.	X.	Y.	Products.
1.	640-49	1415-10			
2.	653-90	1387-83	1294-39	27-27	35298-02
3.	720-36	1286-99	1374-26	100-84	138580-38
4.	853-96	1175-94	1574-32	111-05	174828-24
5.	963-05	1057-64	1817-01	118-30	214952-28
6.	1038-81	844-70	2001-86	202-94	426276-07
7.	1152-51	726-85	2191-32	117-85	258247-06
8.	1184-63	684-46	2337-14	42-39	99071-36
9.	1169-96	668-44	2354-59	16-05	37720-77
10.	1156-86	584-05	2326-82	84-39	196360-34
11.	1175-09	512-32	2331-95	71-73	167270-77
12.	1173-10	437-66	2348-19	74-66	175315-87
13.	1140-24	357-52	2313-34	80-14	185391-09
14.	1121-09	307-04	2261-33	50-48	114151-94
15.	1091-54	287-70	2212-63	19-34	42792-26
16.	1064-48	270-47	2176-02	17-23	37492-82
17.	1063-24	253-90	2147-72	16-48	35294-43
23.	976-72	116-55	2039-96	137-44	280372-10
24.	928-15	132-72	1904-87	16-17	30801-75
25.	890-68	148-63	1818-83	15-91	28937-59
26.	848-53	160-81	1739-21	12-18	21183-58
27.	807-30	167-85	1655-83	7-04	11657-04
28.	790-72	168-34	1598-02	0-49	783-03
29.	772-24	159-88	1562-96	8-46	18222-64
30.	765-06	161-86	1537-30	1-98	3043-85
31.	705-54	188-80	1470-60	26-94	39617-96
32.	677-80	208-70	1383-34	19-80	27528-47
33.	570-41	275-27	1248-21	66-57	83093-34
34.	554-39	280-50	1124-80	5-23	5882-70
35.	500-75	259-42	1055-14	14-92	15742-69
36.	378-26	295-71	879-01	0-29	255-91
37.	281-20	211-21	659-46	15-50	10221-63
38.	268-09	311-49	549-20	0-28	153-78
39.	255-31	309-29	523-31	2-20	1151-28
40.	234-08	296-34	489-39	12-95	6337-60
41.	212-51	287-32	446-59	9-02	4028-24
42.	136-81	283-23	349-32	4-09	1428-78
43.	82-42	268-89	219-23	14-34	3143-76
44.	62-54	289-05	144-96	20-16	2922-39
45.	33-25	361-36	95-79	72-31	6926-57

46.	62-39	374-77	95-64	13-41	1282-53
47.	88-97	471-62	151-36	96-75	14644-08
48.	155-43	604-44	244-70	132-92	32485-65
49.	191-54	717-70	646-97	113-26	39297-82
50.	249-98	871-84	441-52	154-14	68055-89
51.	210-15	923-87	460-13	52-03	23940-56
52.	194-13	998-94	404-28	75-07	30349-30
54.	215-62	1019-65	409-75	20-71	8485-92
55.	390-66	977-52	606-28	42-13	25542-58
56.	368-33	1074-31	758-99	96-79	73462-64
57.	266-68	1118-58	635-01	44-27	28111-89
58.	282-60	1191-08	549-28	72-50	41470-64
59.	342-74	1175-35	625-34	15-73	9836-60
60.	366-82	1274-10	709-56	98-75	70069-05
61.	432-29	1268-97	799-11	5-13	4099-43
62.	464-50	1292-15	896-79	23-18	20787-59
63.	500-57	1324-17	965-07	32-02	30901-54
64.	549-95	1390-00	1050-52	66-43	69786-04
65.	612-21	1406-43	1162-16	15-83	18396-29
1.	640-49	1415-10	1252-70	8-67	10860-91

871141-32 2688306-40
28. 871141-32

28. 1817166-08
8. 908582-54

equivalent to 222 cuerdas of the new measure of 4079-79 square meters.

PARCEL No. 5.—Table Showing Square Surface of Parcel No. 5, Sold by Don Rafael Gutierrez del Arroyo to Mr. Robert Graham:

DIMENSIONS.

1.	Triangle.	Trapeze.	Square surface.
1.	185-17 x 150-75.....		13,957-87
2.	150-75 x 139-75 x 25-50 2	3,718-40
3.	139-75 x 134-50 x 27-50 2	3,805-08
4.	134-50 x 106-75 x 41-50 2	5,005-73
5.	106-75 x 84-50 x 54-40 2	5,201-73
6.	84-50 x 81-25 x 14-50 2	1/201-62
7.	81-25 x 79-75 x 25 2	2,012-50
8.	79-75 x 84-75 x 33-50 2	2/755-38
9.	84-75 x 77- x 18-75 2	1,516-31
10.	77- x 72-75 x 57-25 2	4,286-21
11.	72-75 x 49- x 63-50 2	3,885-25
12.	49 x 26- x 96-75 2 2	3,628-13
13.	540-5 x 7.....		1,891-75
14.	7 x 3-25 x 89 2	455-68
15.	13 x 3: 25.....		21-12
Total.....			53,322-86

Total, 53,322-86 square meters, equivalent to 13-07 cuerdas of the new measure of 4,079-79.

San Juan, Porto Rico, April 1st, 1911.

(Signed)

A. NIN Y MARTINEZ.

And it is further ordered, adjudged and decreed that the said Francisco Robledo leased from the said Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo the said tract of land set forth in the findings of fact herein with full notice of the rights of complainant Robert Graham, therein and that because thereof, he the said Robledo, is not entitled to the use or occupation of said land as against the right of said Graham to purchase and enter upon the possession of the same and the said lease made and executed by the said Rafael and Doña Dolores Gutierrez del Arroyo to the said Francisco Robledo, is, so far as the same may interfere with the right of purchase by said Graham, herein declared to be null and void.

It is further ordered, adjudged and decreed that in the event that the said Rafael Gutierrez del Arroyo and (Doña) Dolores (Gutierrez) del Arroyo shall fail or refuse to execute the deed as in this decree heretofore directed within sixty days from the filing hereof, that then, in that event the clerk of this court shall be and he hereby is authorized and directed to execute said deed or deeds in the name, place and stead of Rafael Gutierrez del Arroyo and Doña Dolores Gutierrez del Arroyo and to deliver the said deed to the said Robert Graham, (provided he has complied with the terms and conditions imposed upon him by the contract) and the said deed thus executed and delivered shall have the same force and effect as if the same had been executed by the said Rafael and Doña Dolores Gutierrez del Arroyo, and to that end the clerk is further authorized to employ a notary and to tax the expense of the proper execution of said deeds against the said defendants Rafael and Dolores Gutierrez del Arroyo, as costs necessarily incurred in this action and for which execution may issue.

And it is further ordered, adjudged and decreed that the lease executed by Rafael and Doña Dolores Gutierrez del Arroyo, and which is set forth in full in the findings of fact herein, was executed by said defendants and the complainant herein with the full understanding and agreement that the same should not in any manner interfere or affect the contract or purchase also set forth in said findings and that

the said lease was an agreement of a temporary character, executed by the parties only because of the delay in consummating the sale now decreed to be executed.

It is further ordered, adjudged and decreed that the complainant, Robert Graham, execute and deliver to the defendants, Rafael and Doña Dolores Gutierrez del Arroyo the undivided interest he purchased from Felicia Fernández as to that portion of the entire estate that remains in the possession of said Rafael and Doña Dolores Gutierrez, after the latter have decided to said Graham the land heretofore described herein, the said Graham, to be allowed on account of his payment for the land purchased by him, the proper relative portion of what he paid for said (for said) Felicia's undivided interest in the portion that remains to said defendants.

It is further ordered and decreed that the complainant herein have and recover of and from the defendants and each of them his costs in this behalf expended or incurred to be taxed by the clerk of the court and for which execution may issue.—Signed.—John J. Jenkins.—Judge.

Third. That in compliance with the directions of the said final decree, the said Rafael Guillermety y Rosales, party of the first part as clerk aforesaid hereby proceeds to execute the said deed called for by the term of said decree, and says:

That as the said tracts of land were imperfectly described in the said contract and decree, the court ordered a survey to be made of the land in controversy, and consequently a survey was duly made by Antolín Nin y Martínez, who is a surveyor, and from which survey the said properties are described as follows, to wit:

A. A tract of land situated in the barrio of Pueblo-Viejo, Municipality of Bayamón, containing (70 cuerdas) seventy cuerdas, equivalent to 28 hectares, 55 areas and 45 hundredths of land, bounded on the north by lands of Graham and Granger Fruit Company, and the American Railroad Company of Porto Rico, which separates it from the property described under letter B; on the east by Succession Gutierrez del Arroyo; on the south by succession Gutierrez del Arroyo and on the west by succession Gutierrez del

Arroyo and the quebrada Juan Domingo, which separates it from property of Frank C. Graham.

B. A tract of land situated in the same barrio and municipality, containing thirteen and six tenths cuerdas equivalent to 5 hectareas, 34 areas and 53 centiareas of land, bounded on the north by lands of Graham Granger Fruit Company and Marcos Caneja; on the east by lands of Rafael Gutierrez del Arroyo, being separated therefrom by a road; on the south by the American Railroad Company of Porto Rico, which separates it from the property described above under letter A, and on the west by lands of Graham Granger Fruit Company.

C. A tract of land situated in the same barrio and municipality containing two hundred and twenty two and seventy hundredths cuerdas of land, equivalent to 90 hectareas, 85 areas and 82 centiareas of land, bounded on the north by the American Railroad Company of Porto Rico and a road; on the east by the finca San Patricio belonging to Francisco Cerecedo, being separate therefrom by the quebrada Barraco, on the south, by the lands of the Southern Cross Fruit Company and on the west by lands belonging to the succession Gutierrez del Arroyo touching a small portion of the quebrada Margarita and a country road.

Fourth. That as clerk of the District Court of the United States for Porto Rico, and in the name, place and stead of Rafael Gutierrez del Arroyo, who is fifty-seven years of age, married, agriculturist and of his sister Dolores Gutierrez del Arroyo, who is a widow seventy-six years, and both residents of Pueblo Viejo, of Bayamón, who are two of the defendants in the said decree mentioned, that they are the owners of the three described tracts of land hereinbefore described under letters A, B, and C.

Fifth. The above three tracts of land formed a part of the larger tract and are aggregated therefrom, which tract is described as follows:

Estancia known as Pueblo Viejo Arriba, situated in the barrio of Pueblo Viejo, Municipality of Bayamón, bounded on the north by Don Manuel Diaz Caneja and Cerecedo Hermanos y Compañía; on the east by Cerecedo Hermanos y

Compañía and Aquilino Power formerly, to day the Sucesión de Don Gerónimo Landrau, Manuel Kercadó and Ulises García Salgado, formerly, at present Rafael Ortíz; on the south by the Sucesión of Don Julio O'Neill, Don Francisco García and Don José Jesús Pesquera and on the west by the property "Rentas" Mauricia de los Santos and Modesta Ortiz de Tejada. That according to the said title, said finca contains from seven hundred to eight hundred cuerdas.

Sixth. That complying with the directions of the said final decree, the said party of the first part as clerk aforesaid and in the name place and stead of Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo hereby bargains, grants and sells to Robert Graham, party of the second part and complainant in said final decree mentioned, the three tracts of land hereinbefore described under letters A, B, and C, and referred to in the final decree aforesaid.

Seventh. That consideration of this sale is the same as agreed upon by the said Robert Graham and Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo by virtue of the contract which originated the equity suit for the specific performance thereof, and which is inserted hereinbefore, that is to say:

The sum of twenty-eight hundred dollars for the parcel of land described under letter A, which is at the rate of forty dollars per cuerda.

The sum of six hundred fifty-three dollars and fifty cents for the parcel of land described under letter B, which is at the rate of fifty dollars per cuerda.

The sum of twelve thousand two hundred forty-eight dollars and fifty cents for the parcel of land described under letter C, which is at the rate of fifty-five dollars per cuerda.

Eighth. That in compliance with the final decree aforesaid, the said Robert Graham pays unto Rafael Guillermetty in his capacity aforesaid the sum of three thousand four hundred fifty-three dollars and fifty cents which is in full payment for the tracts of lands described under letters A and B, that is to say, the sum of two thousand eight hundred dollars for the property described under letter A and six hundred and fifty-three dollars and fifty cents for the one de-

scribed under letter B, which payment is made as aforesaid in my presence and of the witnesses signing.

Ninth. And further complying with the terms of the said final decree, the balance due, that is to say, the sum of twelve thousand two hundred forty-eight dollars and fifty cents, which is the full price to be paid for the property described under letter C, the said Robert Graham promises to pay in a lump sum or in partial payments, to the said Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo within two years from the date of this deed, which sum will not bear interest, but the property described under letter C, containing two hundred and twenty-two cuerdas and seventy hundredths will remain in the possession of the said Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo until the said amount of twelve thousand two hundred forty-eight dollars and fifty cents shall have been paid.

Tenth. It is however understood that the said Robert Graham may pay any amount of the purchase price referred to above, at any time within two years, and that upon the payment of said sum or sums as per the final decree the said Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo will deliver to the said Graham the proportionate share of land paid for as aforesaid, as may be indicated by the said Robert Graham.

Eleventh. It is hereby further agreed that in order to secure the payment of the said twelve thousand two hundred forty-eight dollars and fifty cents the purchase price for the tract of land described under letter C containing two hundred twenty-two cuerdas and seventy hundredths of land, the said Robert Graham with the express consent of his wife here present constitutes a mortgage for said amount on and over the aforementioned tract of land, which mortgage is made for a term of two years, with the privilege of discharging the same at any time before the expiration of the two years in accordance with the terms and conditions of the final decree.

Twelfth. It is further agreed that the sum of seven hundred dollars plus interest at nine per centum per annum from the — day of — up to the date of the filing of the decree

be deducted from the total amount of the purchase price herein, which above-mentioned sum represents the sum paid by the said Robert Graham party of the second part to Felicia Fernández for her undivided interest in the larger tract of land from which the three parcels herein conveyed have been segregated, and the said Robert Graham, hereby agrees under the condition of the decree to transfer the interest purchased from said Felicia Fernández to said Rafael Gutierrez del Arroyo.

All the parties hereto accept this deed, and they ratify and sign the same before me and in the presence of Salvador Suau, and Ricardo La Costa as witnesses, who are of age, residents of this City, being personally known to me.

I read the foregoing deed to the appearing parties and witnesses, they ratify its terms and executed it and I, the notary hereby certify to all of the statements herein contained, and as to ages, status, professions, and residence in accordance with the statements made by the parties.—Signed.—Robert Graham.—May Wood Graham.—Rafael Guillermety.—Ricardo La Costa.—Salvador Suau.—(Signado y firmado.)—Frank Antonsanti.

I hereby certify that the foregoing is a true and correct copy of the original deed number forty-five of the protocol for the year nineteen hundred and eleven, under my custody. In witness whereof and at the request of Gabriel Guerra, I sign and seal the foregoing copy in San Juan, Porto Rico, on the eighteenth day of November nineteen hundred and twelve. Interlineation.—“Robert Graham prays unto”—valid.

FRANK ANTONSANTI.

50 cent stamp cancelled.

"EXHIBIT B."

In the District Court of the United States for Porto Rico.

(Filed July 20, 1911.)

Equity. No. —.

ROBERT GRAHAM, *Complainant,*

vs.

RAFAEL GUTIERREZ DEL ARROYO ET ALS., *Defendants.*

To Rafael Guillermety, Esq., clerk of the aforesaid court:

The complainant above named hereby respectfully requests that you issue a writ of possession in the above suit directing the marshal of this court to deliver the possession of the two smaller tracts of land referred to in the final decree rendered herein, under the descriptions which appear in the deed of conveyance executed in compliance with the said final decree.

WILLIS SWEET,

Solicitor for Complainant,

(Signed) By FRANK ANTONSANTI.

Marshal's Return.

I hereby certify and return that I received this writ on the 22d day of July, 1911, at San Juan, P. R., and executed same on the 24th day of July, at Bayamon, P. R., by placing the within-named Robert Graham in possession of the within-described property as herein I am commanded. This at San Juan, P. R., July 25, 1911.

H. S. HUBBARD,

U. S. Marshal.

(Signed)

JOHN L. HAAS,

Chief Deputy.

In the District Court of the United States for Porto Rico.

(Filed July 28, 1911.)

Equity. No. 672.

ROBERT GRAHAM, *Complainant*,

vs.

RAFAEL GUTIERREZ DEL ARROYO ET ALS., *Defendants*.

The President of the United States of America to the Marshal for said District, Greetings:

You are hereby commanded, without delay, to cause the complainant, Robert Graham, to have possession of the following properties, to wit:

Rustic: A tract of land situated in the barrio of Pueblo Viejo, Municipality of Bayamon, containing (70 cuerdas) seventy cuerdas, equivalent to 28 hectareas, 55 areas and 45 hundredths of land, bounded on the north by lands of Graham and Granger Fruit Company, and the American Rail-road Company of Porto Rico which separates it from the property described under letter B; on the east by Sucesion Gutierrez del Arroyo; on the south by Sucesion Gutierrez del Arroyo, and on the west by Sucesion Gutierrez del Arroyo and the Quebrada Juan Domingo, which separates it from the property of Frank C. Graham.

Rustic: A tract of land situated in the same barrio and municipality, containing thirteen and six-tenths cuerdas, equivalent to 5 hectareas, 34 areas and 53 centareas of land, bounded on the north by land of Graham Granger Fruit Company and Marcos Caneja; on the east by lands of Rafael Gutierrez del Arroyo, being separated therefrom by a road; on the south by the American Railroad Company of Porto Rico, which separates it from the property described above under letter A, and on the west by lands of Graham Granger Fruit Company.

The said complainant Robert Graham, by a final decree of this court rendered at the October term, 1910, of this

court, recover the possession of said tracts of land against Rafael Gutierrez del Arroyo, Doña Dolores del Arroyo and Francisco Robledo.

And do you therefore return the writ into the clerk's office of this court as soon as you have executed the same.

Witness Rafael Guillermet, clerk of the District Court of the United States for Porto Rico this 22nd day of July, A. D. 1911, and the seal of said court.

(Signed) RAFAEL GUILLERMET,
[SEAL.] Clerk.

In the District Court of the United States for Porto Rico.
In Chancery.

(Filed Nov. 20, 1911.)

No. 672. San Juan.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL.

To the Honorable Paul Charlton, judge of the court aforesaid:

Comes now your petitioner, the complainant in the above cause, by N. B. K. Pettingill, his solicitor, and represents unto the court that on the 4th day of April, 1911, a final decree in favor of your petitioner was entered therein decreeing him to be entitled to a specific performance of the contract described in the bill of complaint, by which the defendant Rafael Gutierrez del Arroyo agreed to sell and convey to your petitioner three certain tracts or parcels of land numbered respectively 1, 2, and 5, and specifically described in said final decree as containing respectively 70, 222.70, and 13.07 cuerdas of land, and that by said decree said defendant Rafael Gutierrez del Arroyo was directed and commanded, among other things, "to execute and deliver to the complainant a good and sufficient deed or deeds to the said parcels of land."

Your petitioner further represents that said final decree further provided—

"that in the event that the said Rafael Gutierrez del Arroyo and Doña Dolores del Arroyo shall fail or refuse to execute the deeds as in this decree heretofore directed within sixty days from the filing hereof, that then, in that event the clerk of this court shall be and he hereby is authorized and directed to execute said deed or deeds in the name, place, and stead of Rafael Gutierrez del Arroyo and Doña Dolores del Arroyo and to deliver the said deeds to the said Robert Graham (provided he has complied with the terms and conditions imposed upon him by the contract), and the said deed thus executed and delivered shall have the same force and effect as if the same had been executed by the said Rafael and Doña Dolores del Arroyo," etc.

Your petitioner further represents that said defendant failed to comply with the requirement of said decree that he should execute a good and sufficient deed as required and, upon such failure, a deed was executed pursuant to the alternative fixed therein by the clerk of this court; that thereafter the deed so executed was duly presented to be inscribed in the Registry of Property for the District of San Juan, section 2, that being the proper registry; but that such inscription was on the 13th day of November, 1911, denied by the registrar, who noted upon the same according to law the reasons for such denial in language of which the following is a true translation:

"The inscription of the foregoing document, which is deed number 45 executed in this city of the 6th of July last before the notary Frank Antonsanti Capó, is denied because it appears from the registry that the entire property, from which the three portions sold are segregated, is found inscribed in common and with unequal interests in favor of Don Rafael, Doña Dolores, Don Angel, and Don Manuel Gutierrez del Arroyo; of Don Osvaldo, Don Arcadio, Don Ladislao, Don Ernesta, and Doña Felicia Fernandez y Gutierrez del Arroyo, and of Doña Belén, Doña Carmen, Don Francisco, and Doña María

Gutierrez del Arroyo y Castero, different persons from the defendants except the first two, without its being possible to determine the exact proportion which belongs to each one of such persons and without it being shown that Don Rafael Guillermety, in the name of Don Rafael and Doña Dolores Gutierrez del Arroyo, is selling specified interests in said property; and instead of inscribing a preventative annotation has been entered for the legal period in favor of Mr. Robert Graham as to his title by purchase at folios 226, 235, and 241 of Book 38 of Bayamon, properties numbered 1926, 1927, and 1928, respectively, annotations letter "A," and in favor of Don Rafael and Doña Dolores Gutierrez del Arroyo y Umpierre as to their mortgage right upon the property of 222.70 cuerdas in the same annotation letter "A" of said property 1926, in which there is specified the amendable defect of not stating the interest which each one of said creditors acquires in the mortgage referred to; there having also been specified in annotation letter "A" of the property of 13.06 cuerdas the amendable defect that, the price of the same having been agreed upon at the rate of \$50 per cuerda, the purchaser paid only \$653.50 instead of the \$680 which the said 13.06 cuerdas are worth at the price stated."

all of which will more fully appear from the copy of said deed so presented in the registry, with said note of denial thereon, which your petitioner is ready to produce and exhibit whenever this honorable court shall direct.

Your petitioner further represents that for the reasons above stated he still remains without a recordable title to either of the three tracts of land decreed by the court to be conveyed to him, although said defendant Rafael Gutierrez del Arroyo, under a representation that he had complied with said decree as to the two smaller tracts of land, applied for and obtained an order of this court directing that the purchase price of said two tracts, then lying deposited in the registry of this court, should be turned over to him, and said price was turned over to his solicitor of record pursuant to such order.

Petitioner further represents that on the 22d day of September, 1911, his solicitor wrote and mailed to Miguel Guerra, Esq., solicitor of record for said defendant, a letter notifying him of the tentative refusal of the registrar to inscribe said deed and demanding of said defendant compliance with the terms of said decree, as will more fully appear from said letter, a carbon copy of which your petitioner is ready to produce and exhibit whenever this honorable court shall direct. And your petitioner avers that said Miguel Guerra, Esq., afterwards personally acknowledged the receipt of said letter, but has never made formal answer thereto, and said defendant has apparently made no effort to comply therewith.

Your petitioner further represents that the denial by the registrar of inscription to the deed in question, together with the reasons specified therefor by him, clearly demonstrates that the title of said defendant Rafael Gutierrez del Arroyo to all of said property is imperfect and insufficient, and he has made no effort since entering into said contract with petitioner nor since the entry of said final decree to enable him to comply therewith, and that, in order that said deed given to your petitioner by the clerk of this court may be rendered good and sufficient so as to be inscribed in said registry and invest your petitioner with a proper title, it is incumbent upon said defendant to obtain and present in said registry of property such contracts, conveyances, and documents as may be necessary to cause to be revoked the objections so noted by said registrar as aforesaid and your petitioner's deed to be inscribed therein free from all defects so as to transfer to him a clear record title, according to the true intent and meaning of said final decree of this court. And your petitioner avers that, as he is informed and believes, said defendant Rafael Gutierrez del Arroyo is the real owner of the full title to said three tracts of land, that he has it in his power to obtain all necessary documents and conveyances to have such title duly appear in the registry, but that he delays and refrains from making any real or sufficient effort to do so, for what reason petitioner

is not informed, unless it be to harass him and prevent him from obtaining title to and possession of said tract of larger dimensions, for which petitioner has not yet paid on account of the failure of title as aforesaid.

Your petitioner avers that he is now, and has for a long time been, ready and willing to pay the price for said tract of 222.70 cuerdas whenever good title thereto can be had, and that because of such readiness and the failure of defendant to comply with said decree on his part petitioner is entitled to the order of this court giving him the possession of said tract pending compliance on the part of said defendant as aforesaid.

Wherefore your petitioner prays that a rule may issue out of and under the seal of this court, directed to the said Rafael Gutierrez del Arroyo, requiring and enjoining him within a short day to be fixed by the court to obey and comply with the command and direction of said final decree by obtaining and presenting in said Registry of Property of San Juan, section 2, all such contracts, conveyances, or other documents as may be necessary to cause to be revoked each and every of the objections noted by said registrar upon the deed executed in favor of your petitioner by the clerk of this court and your petitioner's deed to be inscribed therein without defects, and meantime to turn over to your petitioner the possession and control of said tract of 222.70 cuerdas still remaining in the possession of said defendant until your petitioner may make some default in his compliance with the terms of said decree on his part to be performed, or, in default of compliance with said requirements, to show cause before this honorable court why he should not be adjudged in contempt of the lawful order and process of this court and be punished accordingly.

And your petitioner will ever pray.

(Signed)

N. B. K. PETTINGILL,

Counsel for Petitioner.

UNITED STATES OF AMERICA,
District of Porto Rico:

Robert Graham, being first duly sworn, says that he is the petitioner above named, that he has read the foregoing petition and knows the contents thereof, and that the allegations of fact therein set forth are true of his own knowledge.

(Signed)

ROBERT GRAHAM.

Sworn to and subscribed before me this 20th day of November, 1911.

(Signed)

RAFAEL GUILLERMETY, *Clerk.*

[SEAL.]

Return on Service Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed writ on the therein-named Miguel Guerra, counsel of record for the defendant together with a copy of Petition by handing to and leaving a true and correct copy thereof with him personally at San Juan, P. R. in said district on the 22nd day of November, A. D. 1911.

H. S. HUBBARD,

U. S. Marshal,

(Signed)

By JOHN L. HAAS, *Deputy.*

In the District Court of the United States for Porto Rico.

(Filed Nov. 23d, 1911.)

No. 672. San Juan.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL.

Order for Rule.

The complainant above named having presented to the Court his *ex parte* petition herein for a rule against Rafael Gutierrez del Arroyo, one of the defendants herein, as in said petition prayed; and this Court having considered the same and found that the Rule prayed for should issue;

It is therefore hereby ordered that said defendant Rafael Gutierrez del Arroyo be and appear before this Court on Saturday, the 25th day of November, 1911, at 2 o'clock P. M. at Chambers in San Juan, Porto Rico, to show cause, if any there be, why he has not obeyed and complied with the command and direction of the final decree entered in the above entitled cause by obtaining and presenting in the Registry of Property all such contracts, conveyances and other documents as may be necessary to cause the deed in favor of petitioner, executed under the order of this Court, to be inscribed therein without defects; and why, for failure so to do, he should not be adjudged in contempt of the lawful order and process of this Court and be punished accordingly.

It is hereby further ordered that this rule be served upon said defendant Rafael Gutierrez del Arroyo by delivering a true copy hereof, together with a true copy of the said petition forthwith upon Miguel Guerra, Esq'r, counsel of record for said defendant herein, which service shall be made by the Marshal.

Done and ordered in Chambers at San Juan, this 21st day of Nov., 1911.

(Signed)

PAUL CHARLTON, *Judge.*

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, Rafael Guillermet, Clerk of the District Court of the United States for Porto Rico do hereby certify that the foregoing is a true and correct copy of the Original Order for Rule in the above entitled cause, as the same appears on file and of record in my office under date of November 21st, 1911.

Witness, my official signature and the Seal of said Court, at San Juan, in said District, this 21st day of November, A. D. 1911, and in the 136th year of the Independence of the United States of America.

(Signed) RAFAEL GUILLERMET, *Clerk.*

[SEAL.]

(Signed) By L. A. GROSS, *Deputy.*

Return on Service Writ.

UNITED STATES OF AMERICA,
The District of Porto Rico, ss:

I hereby certify and return that I have served the annexed writ on the therein-named Miguel Guerra as Counsel of Record for defendant by handing to and leaving a true and correct copy thereof with him personally at San Juan, P. R. in said district on the 28th day of November, A. D. 1911.

H. S. HUBBARD,

U. S. Marshal,

(Signed)

By JOHN L. HAAS,

Chief Deputy.

In the District Court of the United States for Porto Rico.
In Chancery.

(Filed Nov. 28th, 1911.)

No. 672. San Juan.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL.

This being the day named for a return to the Rule issued herein on the 21st day of the present month, requiring the defendant Rafael Gutierrez del Arroyo to show cause, if any there might be, why he has not obeyed and complied with the command and direction of the final decree heretofore entered herein in the respects in said Rule specified, the same is called for hearing at 2 o'clock P. M. of this day; and it thereupon appears, upon said defendant being called, that he is not present in person in response to said Rule, nor is he represented by counsel, nor has any written response been filed thereto in his behalf.

It is therefore hereby ordered that the allegations in complainant's petition contained be taken as confessed, and that said defendant Rafael Gutierrez del Arroyo be, and he is hereby, adjudged to be in contempt of this Court for failure to obey its lawful order and process.

But it further appearing from the voluntary statements made to the Court by counsel for complainant that said defendant has recently presented in the Registry of Property certain documents and conveyances tending to perfect his title to the property referred to in said petition, the sufficiency of which for that purpose should be passed upon by said Registrar within a few days; it is hereby further ordered that, unless said defendant Rafael Gutierrez del Arroyo shall on or before Saturday, the 2nd day of December, 1911, at 12 o'clock, noon, produce and present to this Court all deeds and documents necessary to cause the deed in favor of

complainant, executed under the order of this Court, to be inscribed in the Registry of Property without defects, with certificates on said deeds and documents showing that they have been already inscribed, he shall forthwith turn over and deliver to the complainant, Robert Graham, the custody and possession of the tract of 222.70 cuerdas of land described in said final decree and said complainant Graham shall retain and exercise such custody and possession until the further order of this Court. And at the same time this Court will consider and determine the punishment to be inflicted upon said Rafael Gutierrez del Arroyo for the acts of contempt of which he is adjudged to be guilty.

It is further ordered that, in case said Rafael Gutierrez del Arroyo fails or refuses to obey the foregoing direction to turn over and deliver said tract of land to the complainant, the Marshal of this Court shall place said complainant in possession thereof, his authority therefor to be a copy of this order and a certificate of the Clerk of this Court that no order relieving said defendant from the obligation to deliver has been made herein.

It is further ordered that the Marshal of this Court serve a copy of this Order upon Miguel Guerra, Esq., counsel of record for said defendant.

Done and ordered in open Court at San Juan, this 25th day of November, 1911.

[SEAL.] (Signed) PAUL CHARLTON, *Judge*.

Now on this 5th day of December, 1911, being one of the days of this November term of this Court, after hearing all parties in interest in this case the time for compliance with the within order is hereby extended up to and including December 12th, 1911, and the Respondents herein are purged and released of any charge of contempt, as are also their counsel's.

Given on this 5th day of December, A. D. 1911.

[SEAL.] (Signed) PAUL CHARLTON, *Judge*.

Marshal's Return.

I hereby certify and return that I received this writ on the 26th day of January, 1912, at San Juan, P. R., and executed same on the 2nd day of February, 1912, by delivering a true copy to Miguel Guerra as Counsel of record for Defendant.

Thereafter, to wit, on the 3rd day of February I delivered a true copy of this Writ to Rafael Guitierrez del Arroyo at Bayamon, P. R., and placed Robert Graham, Plaintiff herein, in possession of the 222.70 cuerdas of land as described in the final decree in this cause and as herein I am commanded.

This at San Juan, P. R., February 5th, 1912.

H. S. HUBBARD,

U. S. Marshal,

(Signed)

By JOHN L. HAAS,

Chief Deputy.

In the District Court of the United States for Porto Rico.

(Filed Feb. 6th, 1912.)

Equity. No. 672.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL.

Order.

This being the day named for a return to the Rule-issued herein on the 21st day of the present month, requiring the defendant Rafael Gutierrez del Arroyo to show cause, if any there might be, why he has not obeyed and complied with the command and direction of the final decree heretofore entered herein in the respects in said Rule specified, the same is called for hearing at 2 o'clock P. M. of this day; and it thereupon appears, upon said defendant being called, that he is not present in person in response to said Rule, nor is

he represented by counsel, nor has any written response been filed thereto in his behalf.

It is therefore hereby ordered that the allegations in complainant's petition contained be taken as confessed, and that said defendant Rafael Gutierrez del Arroyo be, and he is hereby, adjudged to be in contempt of this Court for failure to obey its lawful order and process.

But it further appearing from the voluntary statements made to the Court by counsel for complainant that said defendant has recently presented in the Registry of Property certain documents and conveyances tending to perfect his title to the property referred to in said petition, the sufficiency of which for that purpose should be passed upon by said Registrar within a few days; it is hereby further ordered that, unless said defendant Rafael Gutierrez del Arroyo shall on or before Saturday, the 2nd day of December, 1911, at 12 o'clock, noon, produce and present to this Court all deeds and documents necessary to cause the deed in favor of complainant, executed under the order of this Court, to be inscribed in the Registry of Property without defects, with certificates on said deeds and documents showing that they have been already inscribed, he shall forthwith turn over and deliver to the complainant, Robert Graham, the custody and possession of the tract of 222.70 cuerdas of land described in said final decree and said complainant Graham shall retain and exercise such custody and possession until the further order of this Court. And at the same time this Court will consider and determine the punishment to be inflicted upon said Rafael Gutierrez del Arroyo for the acts of contempt of which he is adjudged to be guilty.

It is further ordered that, in case said Rafael Gutierrez del Arroyo fails or refuses to obey the foregoing direction to turn over and deliver said tract of land to the complainant, the Marshal of this Court shall place said complainant in possession thereof, his authority therefor to be a copy of this Order and a certificate of the Clerk of this Court that no order relieving said defendant from obligation to deliver has been made herein.

It is further ordered that the Marshal of this Court serve

a copy of this Order upon Miguel Guerra, Esq., counsel of record for said defendant.

Done and ordered in open Court at San Juan, this 25th day of November, 1911.

(Signed)

PAUL CHARLTON, *Judge.*

THE UNITED STATES OF AMERICA,

District of Porto Rico, ss:

I, Rafael Guillermet, Clerk of the District Court of the United States, within and for the District aforesaid, do hereby certify, that the foregoing is a true and correct copy of the Order given in the above entitled case, as it appears of record and on file in my office under date of November 25, 1911.

And I further certify that no order has been given relieving said defendant from the obligation to deliver.

Witness my official signature and the seal of this Court at San Juan, Porto Rico, this 26th day of January, 1912, and in the 136th year of the Independence of the United States of America.

[SEAL.] (Signed) RAFAEL GUILLERMET,

Clerk.

In the District Court of the United States for Porto Rico.

(Filed February 12, 1912.)

No. 672. San Juan.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL.

To Miguel Guerra, Esq., counsel of record for defendants:

You will please take notice that I have this day filed on behalf of the complainant herein a Petition for the Assessment of Waste, a true copy of which is herewith de-

livered, and that on Friday, the 16th day of February, 1912, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, I will mail application to the Honorable Paul Charlton, judge of said court, for an order granting the same and appointing one or more appraisers as he may be advised; said application to be made at Chambers at Fort San Geronimo, or wherever the judge may then be.

And you will please be present there, in case you desire to oppose said motion.

Dated at San Juan this 12th day of February, 1912.

(Signed)

N. B. K. PETTINGILL,

Counsel for Complainant.

I, the undersigned, do hereby certify that on said 12th day of February, 1912, I deposited in the post-office at San Juan a true copy of the foregoing notice with a true copy of the petition referred to therein in an envelope sealed and stamped and directed to the said Migule Guerra, Esq., at his usual post-office address, which is San Juan, P. R.

(Signed)

N. B. K. PETTINGILL,

Counsel for Complainant.

In the District Court of the United States for Porto Rico.

(Filed February 12, 1912.)

No. 672. San Juan.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL.

Petition.

To the Honorable Paul Charlton, judge of said court:

Your petitioner, the complainant in the above cause, respectfully represents unto your honor that on the 18th

day of May, A. D. 1910, a final decree for specific performance was entered in his favor; that, because of errors committed by the surveyor in the admeasurement of said property which had been incorporated in said final decree, it became necessary to ask this court to correct the same by filing a bill of review, which your petitioner did and which resulted in a second final decree, dated the 4th day of April, 1911, whereby said errors of admeasurement were corrected; all of which will more fully appear from the records and proceedings of this court in said cause.

Your petitioner further represents that by said final decree the defendants were required to convey to petitioner upon payment of the stipulated price several distinct parcels of land, and that the error of admeasurement above referred to pertained to all of them, including, to wit, that described in said decree as lot No. 2, containing about 200 acres, which said lot remained in possession of said defendants until a recent order of this court because defendants were unable to give petitioner a recordable title, although petitioner was at all times ready to comply with the obligations on his part on the tender of such title, but petitioner is now informed by counsel for defendants that they are ready to tender and execute such a title.

Your petitioner further represents that during the pendency of said bill of review the defendants, or their agents and servants, entered upon said lot No. 2, which they had already been ordered and decreed to turn over and convey to petitioner, and to which petitioner from the date of said first final decree had a right of possession in the condition it then was, and committed extensive waste thereon by cutting down and removing therefrom a large number of hard-wood trees of great value, the kind and number of the same being unknown to petitioner because he was refused permission to enter upon that property until given possession recently by order of this court as aforesaid; that because of such commission of waste, defendants paying no attention to the protests of petitioner against the same, he was obliged to seek the aid of this court by petitioning for

a restraining order to prevent a continuance of such waste, which was granted him on the 26th day of December, A. D. 1910, and has remained and still is in full force and effect without any attempt to vacate the same on the part of defendants, and that the trial of the issue upon said petition for the restraining order determined and found the fact of such commission of waste on the part of defendants.

Your petitioner further represents that equity and justice require that, whenever defendants shall execute and tender to petitioner a proper and recordable title to said lot No. 2 and demand of petitioner the payment of the price therefor as stipulated in the contract which this court has decreed to be specifically performed, petitioner shall have the right to deduct from such price the decrease in value caused by the waste unlawfully committed thereon by said defendants as aforesaid, and that, in order that such decrease in value may be ascertained as that petitioner may be allowed to deduct the same from the purchase price to be paid by him. in furtherance of the execution of said final decree, this court should ascertain and determine the same by the appointment of examiners or assessors, or in such other way as may seem to it meet and proper.

The premises considered, your petitioner prays that his right to deduct from the purchase price of said lot No. 2 the decrease in value caused by the commission of the waste aforesaid be declared; that one or more examiners or appraisers be named by the court to ascertain and report the extent of said waste and amount of depreciation caused thereby; that upon the coming in of such report, or in such other manner as the court may elect, the amount of deduction in the purchase price because of such waste which is reasonable and just be fixed and determined, and that defendants be directed and required to make such allowance and to accept the stipulated price less such deduction, delivering to petitioner his deed of conveyance pursuant to the decree upon payment thereof.

Petitioner further represents that, because of the delay in the transfer of title to said lot No. 2 by reason of the

inability of defendants to deliver same, certain taxes have accrued to the Insular Government which defendants have failed to pay and for which said land is legally responsible; wherefore petitioner asks that such unpaid taxes accruing before possession of the land was turned over to him be allowed also as deduction from the purchase price.

(Signed)

N. B. K. PETTINGILL,
Counsel for Petitioner.

UNITED STATES OF AMERICA,

District of Porto Rico:

Robert Graham, being duly sworn, says that he is the petitioner aforesaid; that he has read the petition and knows its contents, and that the allegations of fact therein contained are true of his own knowledge.

(Signed)

ROBT. GRAHAM.

Sworn to and subscribed before me this 12th day of February, A. D. 1912.

[SEAL.] (Signed) RAFAEL GUILLERMETY.

In the District Court of the United States for Porto Rico.

(Journal Entry June 10, 1912.)

Equity. No. 672.

ROBERT H. GRAHAM

vs.

RAFAEL GUTIERREZ ET AL.

Decree.

It is therefore adjudged and decreed, upon the motion filed herein, that the complainant Robert Graham will therefore be authorized to retain from the consideration paid by him for the conveyance in the sum of four thousand

dollars (\$4,000), in repayment for waste committed by respondent or their agents upon the tracts of woodland here under consideration and one hundred and three dollars and thirty-four cents on account of taxes and surcharges, to which action of the court counsel for respondents duly objects and excepts.

This order is entered here as of and for the 30th day of March, 1912.

In the District Court of the United States for Porto Rico.

Filed June 11, 1912.

No. 672. San Juan.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO.

To the Honorable Paul Charlton, judge of the court aforesaid:

Comes now the complainant in the above cause, by his solicitor, N. B. K. Pettingill, and represents to the court that on the 4th day of April, 1911, a final decree in the above suit was entered in favor of your petitioner by which, among other things, the defendant aforesaid was directed and commanded to execute and deliver to petitioner a good and sufficient deed or deeds to certain parcels of land, among which was a certain parcel of 222.70 cuerdas, in specific performance of a certain written contract in which the agreed price for said tract had been fixed at \$12,248.50; that said defendant failed to comply with the direction and command of said decree, whereupon, in pursuance of the authority therein contained, a deed was executed in his behalf and stead by the clerk of this court before the notary Frank Antonsanti on the 6th day of July, 1911, under No. 43 of his protocol; and that by the eleventh paragraph of said deed your petitioner and his wife granted said defendant

a mortgage lien upon said tract of 222.70 cuerdas for the payment of said purchase price above mentioned.

Petitioner further represents that thereafter he presented for record in the registry of property the conveyance so made to him by the clerk of this court as aforesaid, but that the inscription of such deed was denied by the registrar because said defendant did not at that time appear in said registry to be the owner of said property, and that the cost to petitioner of such futile presentation in the registry was \$38.50 occasioned by the failure of defendant to comply with the requirements of said decree.

Petitioner further represents that on the 1 day of February, 1912, he presented in this court his petition against the defendant, alleging that subsequent to the entry of the original decree of specific performance in favor of petitioner in this suit certain waste had been committed by defendant upon a part of said tract of 222.70 cuerdas, and praying that the extent of such waste and the damage caused petitioner thereby should be ascertained and petitioner be declared to have the right to deduct the amount of such damage from the agreed purchase price, secured by mortgage as aforesaid, and the defendant ordered to accept the stipulated price less such deduction in full satisfaction of such indebtedness; that, after notice given, such assessment of damage was made and a hearing had, as a result of which the amount of such damage was assessed by the court to be the sum of \$4,000, and the defendant ordered and required to deduct that amount from the purchase price originally fixed, and that by the same order petitioner was also allowed to make a further deduction from said price of the sum of \$103.34 because of taxes which defendant had failed to pay and which had become a lien upon said property which it would be necessary for your petitioner to satisfy and discharge.

Petitioner further represents that the expenses of the proceeding for the assessment of waste as aforesaid which he has been compelled to pay, although defendant was ordered

to do so by this court, amount to \$120 paid to the assessor as fixed by the court and \$40 paid for a survey of the part of the property where waste had been committed, and the making of a map thereof for the information of the court, making a total of \$160, and that, in addition thereto, the court costs in this proceeding which should be adjudged against the defendant amount to the further sum of \$15.65.

Petitioner further represents that he has repeatedly requested of the defendant, through his attorney, that said defendant execute a release of said mortgage lien contained in the deed of July 6, 1911, as aforesaid, petitioner offering to pay to said defendant upon the execution of such release the said sum of \$12,248.50 less the various sums which he has been directed to deduct therefrom as aforesaid and the costs of this court, that is to say, the sum of \$7,931.01, but on this the 10th day of June, 1912, defendant has, through his said attorney, definitely refused to accede to the reasonable request of petitioner, by reason whereof it becomes necessary to seek the assistance and order of this honorable court.

The premises considered, your petitioner therefore prays that an order may be entered herein directing and requiring the said defendant Rafael Gutierrez del Arroyo to execute and deliver to petitioner within two days from the date hereof, and upon the payment to said defendant of the sum of \$7,931.01 aforesaid, a full release and discharge of all indebtedness of petitioner for the purchase price of said tract of land and of said mortgage lien contained in said deed of July 6, 1911, as aforesaid, and that, upon the failure of said defendant so to do, the clerk of this court be authorized and directed to execute and deliver such release and discharge in the name and on behalf of said defendant upon the payment by your petitioner into the registry of this court of the sum of money last aforesaid, to the end that petitioner may thus remove the lien upon said property for the purchase price thereof and hold the same by an unincumbered registered title, according to the

purport and effect of the contract between the parties so as aforesaid decreed to be specifically performed.

And your petitioner will ever pray.

(Signed)

N. B. K. PETTINGILL,

Counsel for Petitioner.

UNITED STATES OF AMERICA,

District of Porto Rico:

Robert Graham, being first duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the statements therein contained, except some of those taken from the records of the court, are true of his own knowledge.

(Signed)

ROBT. GRAHAM.

Sworn to and subscribed before me this 11th day of June, A. D. 1912.

(Signed)

RAFAEL GUILLERMETY,

[SEAL.]

Clerk U. S. District Court.

In the District Court of the United States for Porto Rico.

(Filed June 13th, 1912.)

No. 672. San Juan.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO.

This cause comes on this day to be again heard upon the petition of the complainant for an order directing the defendant to make certain allowances heretofore fixed by the court from the purchase price originally to be paid by the complainant for the tract of land described as parcel number two in the final decree herein and containing 222.70 cuerdas of land, and upon the payment by complainant of said pur-

chase price for such deductions to execute in his favor a release and discharge of the lien retained by defendant for such purchase price; and, in case of the failure of defendant to execute such release in compliance with such order, to authorize and direct the clerk of this court to execute and deliver the same in the name and stead of said defendant.

And it appearing to the court from the record in said cause and the sworn allegations of said petition that the price originally agreed to be paid for said tract number two was the sum of \$12,248.50; that since said agreement was made waste has been committed upon a portion of said tract by the defendant to the damage of the same and of the complainant in the sum of \$4,000 as ascertained and adjudged by this court on the 30th of March last; and that complainant has been put to an additional expense of \$38.50 for revenue stamps because of defendant's failure to record said land in due time in his own name so that the deed executed under the authority of this court and tendered for record in the registry was refused; that said land is liable for unpaid and overdue taxes in the sum of \$103.34 which defendant should have paid, as ascertained and adjudged by said order of March 30th last; that the expenses incurred in ascertaining and adjudicating the amount of waste committed by defendant as aforesaid was the sum of \$160 which defendant should in good conscience refund to the complainant; that the court costs incurred and made necessary by these supplementary proceedings arising from the default of the defendant in complying with the terms of said final decree amount to the sum of \$15.65; and that complainant is entitled in equity and good conscience to have each and all of said several sums deducted from the purchase price originally agreed to be paid for said tract of land and to have a full release and discharge from the defendant upon the payment of said price less the total sum of said deductions:

It is, therefore, hereby ordered, adjudged and decreed that the said defendant Rafael Gutierrez del Arroyo, do, within two days from the date hereof, execute and deliver to the complainant a full and solemn notarial release and discharge from all indebtedness for the purchase price of said tract

number two described in said final decree herein, dated the 4th day of April, 1911, and from said mortgage lien to secure the same contained in paragraph numbered eleven in the deed executed by the clerk of this court under its authority and dated the 6th day of July, 1911, upon payment being made by complainant to the defendant of the original purchase price aforesaid less the deductions above specified, that is to say, of the sum of \$7,931.01.

And it is further hereby ordered, adjudged and decreed that, in case of the failure or refusal of said defendant to execute said release and discharge upon the terms above specified, the clerk of this court, Rafael Guillermet, Esqr., is hereby authorized and directed to make, execute and deliver such release and discharge in the name and stead of said defendant Rafael Gutierrez del Arroyo, upon the payment by the complainant into the registry of this court for the use and benefit of said defendant of the sum of money last above specified, which said sum of money shall be paid over out of said registry to said defendant at his request; provided that said clerk of this court is hereby further authorized to pay out of said fund the proper and reasonable fees of the notary for the drawing and execution of the release and discharge of said mortgage lien as aforesaid.

And leave is hereby given the complainant to apply for further orders or instructions in the premises, if the same may become necessary.

Done and ordered in open court, at San Juan, Porto Rico, this 13th day of June, A. D. 1912.

[SEAL.] (Signed) PAUL CHARLTON, Judge.

In the District Court of the United States for Porto Rico.

(Filed July 1st, 1912.)

No. 672. San Juan.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL.

Comes the complainant in the above suit, by his counsel N. B. K. Pettingill, and respectfully represents to the court that on the 13th of June last this court entered its order and decree herein providing for the release and cancellation, upon certain specified conditions, of the mortgage given by complainant, in the same deed executed in his favor under the order of this court herein by its clerk on the 6th day of July, 1911, to secure the purchase price of a described tract of land containing 222.70 cuerdas; that by inadvertence of counsel said order and decree was made to refer apparently to the defendant Rafael Gutierrez del Arroyo alone, instead of to said defendant jointly with his co-defendant and co-owner in said tract of land, Dolores Gutierrez del Arroyo; and that, because by the terms of the mortgage given by complainant as aforesaid the lien existing by virtue thereof runs in favor of both said defendants, the said order and decree of June 13, 1912, should have included and have been directed against both said defendants.

Wherefore, the premises considered, complainant prays that such verbal amendments may be made in said order and decree of June 13, 1912, as may be necessary to make the same refer to and include within its command both said defendants, Rafael and Dolores Gutierrez del Arroyo; and that said order and decree, as so amended, may be re-entered and dated *nunc pro tunc* as of the same 13th day of June, 1912.

(Signed)

N. B. K. PETTINGILL,

Counsel for Complainant.

UNITED STATES OF AMERICA,
District of Porto Rico:

N. B. K. Pettingill, being duly sworn, deposes and says: that he is counsel of record for the complainant and drew the order and decree submitted to and signed by the judge of said court on the 13th day of June, 1912; that he knows the contents of the foregoing petition; and that the statements of fact therein contained are true.

(Signed)

N. B. K. PETTINGILL.

Sworn to and subscribed before me this 1st day of July, 1912.

RAFAEL GUILLERMETY, *Clerk*,
 By N. V. COLBURN, *Deputy*.

Order.

The petition of complainant for the verbal amendment of the order and decree in this cause dated June 13, 1912, so as to express more clearly its real intention is hereby, upon consideration of said petition and of the matters appearing of record therein, granted, and that said order and decree is hereby directed to be re-entered *nunc pro tunc* as of said 13th day of June, 1912, in the form hereto attached and signed by the court.

San Juan, July 1st, 1912.

[SEAL.] (Signed) PAUL CHARLTON, *Judge*.

In the District Court of the United States for Porto Rico.

No. 672. San Juan.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL.

Amended Order.

This cause comes on this day to be again heard upon the petition of the complainant for an order directing the defendants Rafael Gutierrez del Arroyo and Dolores Gutierrez

del Arroyo to make certain allowances heretofore fixed by the Court from the purchase price originally to be paid by the complainant for the tract of land described as Parcel Number Two in the final decree herein and containing 222.70 cuerdas of land; and, upon the payment by complainant of said purchase price with such deductions, to execute in his favor a release and discharge of the lien retained by said defendants for such purchase price; and, in case of the failure of defendants to execute such release in compliance with this order, to authorize and direct the clerk of this court to execute and deliver the same in the name and stead of said defendants.

And it appearing to the Court from the record in this cause and the sworn allegations of said petition that the price originally agreed to be paid for said Parcel Number Two was the sum of \$12,248.50; that since said agreement was made waste has been committed upon a portion of said tract by the defendants to the damage of the same and of the complainant in the sum of \$4,000. as ascertained and adjudged by this Court on the 30th of March last; that complainant has been put to an additional expense of \$38.50 for revenue stamps because of defendants' failure to record said land in due time in their names so that the deed executed under the authority of this Court and tendered in the Registry of Property was refused; that said land is liable for unpaid and overdue taxes in the sum of \$103.34 which said defendant should have paid, as ascertained and adjudged by said order of March 30th last; that the expenses incurred in ascertaining and adjudicating the amount of waste committed by defendants as aforesaid was the sum of \$160., which defendants should in good conscience refund to complainant; that the court costs incurred and made necessary by these supplementary proceedings arising from the default of the defendants in complying with the terms of the final decree herein amount to the sum of \$15.65; and that complainant is entitled in equity and good conscience to have each and all of said several sums deducted from the purchase price originally agreed to be paid for said tract of land and to have a full release and

discharge from said defendants upon the payment of said price less the sum total of said deductions.

It is therefore hereby ordered, adjudged and decreed that the said defendants, Rafael Gutierrez del Arroyo and Dolores Gutierrez del Arroyo, do, within two days from the date hereof, execute and deliver to the complainant a full and solemn Notarial release and discharge from all indebtedness for the purchase price of said Parcel Number Two, described in said final decree herein dated the 4th day of April, 1911, and from said mortgage lien to secure the same contained in the paragraph numbered eleven of the deed executed by the Clerk of this Court under its authority and dated the 6th day of July, 1911, upon payment being made by complainant to the defendants of the original purchase price aforesaid less the deductions above specified, that is to say, the sum of \$7,931.01.

And it is further hereby ordered, adjudged and decreed that, in case of the failure or refusal of said defendants, or either of them, to execute said release and discharge upon the terms above specified, the Clerk of this Court, Rafael Guillermet, Esqr., is hereby authorized and directed to make, execute and deliver such release and discharge in the name and stead of said defendants, Rafael and Dolores Gutierrez del Arroyo, upon the payment by the complainant into the Registry of this Court for the use and benefit of said defendants of the said sum of Seven Thousand Nine Hundred Thirty-one and 01/100 Dollars (\$7,931.01), which said sum shall be paid over out of said Registry to said defendants whenever requested by them; provided that, said Clerk of this Court is hereby further authorized to pay out of said fund the proper and reasonable fees of the Notary for the drawing and execution of the release and discharge of said mortgage lien as aforesaid.

And leave is hereby given the complainant to apply for further orders or instructions in the premises, if the same may become necessary.

Done and ordered in open Court at San Juan, Porto Rico, this 13th day of June, 1912.

(Signed)

PAUL CHARLTON, *Judge.*

UNITED STATES OF AMERICA,

District of Porto Rico, ss:

I, Rafael Guillermety, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing are true and correct copies of the Original:

Motion for Writ of Possession. Filed July 20th, 1911.

Writ of Possession with service thereto. Filed July 28th, 1911.

Petition for Rule. Filed November 20th, 1911.

Certified Copy of Order for Rule with service thereto. Filed November 23, 1911.

Order to Show cause with service thereto. Filed Nov. 28th, 1911.

Certified Copy of Order to Show cause with service thereto. Filed February 6th, 1912.

Petition for Appraisement of Waste. Filed February 12th, 1912.

Decree. Journal Entry of June 10th, 1912 (Entered as of and for the 30th day of March, 1912).

Petition for Order to Execute Release. Filed June 11th, 1912.

Order for Execution of Release. Filed June 13th, 1912.

Order and Amended Order for Cancellation of Mortgage. Filed July 1st, 1912.

in the above entitled cause, as they appear on file and of record in my office under the said dates.

Witness my official signature and the Seal of said Court, at San Juan, in said District, this 18th day of December, A. D. 1912, and of the Independence of the United States the 137th year.

[Seal United States District Court for the District
of Porto Rico.]

RAFAEL GUILLERMETY, *Clerk,*

By L. A. GROSS, *Deputy.*

[Endorsed:] No. 672. Equity. In the District Court of the United States for Porto Rico. Robert Graham, Complainant, vs. Rafael Gutierrez del Arroyo et al., Defendants.

"EXHIBIT C."

In the District Court of the United States for Porto Rico.

No. 672. Equity.

ROBERT GRAHAM

vs.

RAFAEL GUTIERREZ DEL ARROYO ET AL.

A contract for a deed in writing was entered into between the parties hereto about the year 1906, under and by virtue of the terms whereof, the respondents contracted to deliver to the complainant a merchantable title to three parcels of land in the district of Pueblo Viejo in the municipality of Bayamón, approximating in area three hundred acres. A portion of the largest of the three tracts of land, approximating in area 200 acres consisted of 19.19 acres of woodland, and upon said tract of woodland were various trees of merchantable size, containing lumber of considerable value.

Near the close of the year 1910, and while the contract for a deed was not fully executed, by conveyance from the respondents to the complainants, and payment by complainant to respondents for the same, it appears from the evidence that the respondents by their agents, entered upon said tract of woodland and removed therefrom trees of merchantable size, which were used for lumber and as timber, and also trees of smaller size which were burned into charcoal. Upon December 27, 1910, the complainant made application to this court for a restraining order to prevent the respondents from committing waste upon said tract of woodland by cutting down and removing therefrom trees of value, on the ground that it was in the contemplation of the contract that such trees were a valuable inducement to the complainant in entering into said contract. This Court upon said date issued its restraining order, restraining the respondents, their agents, servants or employees from "cutting, removing, selling, burning or manufacturing any trees, tim-

ber or wood of any character or kind now standing, being or growing upon the premises or any part or portion thereof decreed by this Court to be by you transferred and delivered to Robert Graham."

The Respondents thereafter did refrain from doing any of the acts against which the restraining order of the Court had been directed.

Subsequently, and upon February 12, 1912, there was filed on behalf of Complainant a petition for the appraisal of the waste alleged to have been committed by the respondents or their agents in the removal from the tract of woodland of trees of value, and upon February 24, 1912, there was appointed by this Court, one Fred L. Hunter, who was instructed in said order to proceed upon said premises and make a survey of the trees which had been removed within a recent time, and to assess the value of such trees.

Before proceeding to make survey and assessment, the assessor so appointed gave notice to one of counsel for the respondents that he was proceeding upon said premises for the purpose of his appointment, upon a certain day. There appears to have been some difficulty in the delivery of said notice to counsel for the respondents, who at that time was engaged in his official duties as a member of the House of Delegates of Porto Rico, and subsequently the assessor appears to have stated to counsel for respondents, verbally, that he would not proceed with such survey until a later day. In the absence of the Judge of this Court in Mayaguez, the Marshal of the Court admonished the assessor to proceed with his duties, which he thereupon did, and at the date when he made said survey, there was present upon said tract of woodland, and with said assessor, the complainant herein and several other persons, among them one Ramos who was related by consanguinity or marriage to Rafael Gutierrez del Arroyo, the principal respondent here.

The assessor appears to be a man of experience in the estimate of timber, both standing and from stumpage, and his report filed herein on March 8th, 1912, shows that he made a careful and as thorough as was possible examination

of the tract in question, the same being densely overgrown with underbrush and standing trees of small diameter. On his oral examination at the request of counsel for the respondents, Mr. Hunter testified that he had had some years of experience in scaling lumber from the stump in the United States; that he had observed in other pieces of woodland, trees of the kind and diameter of those, the stumps of which remained upon the woodland tract in question, and that such examination of actual standing trees confirmed the figures of his report as being conservative, the witness testifying that if an absolutely thorough scaling had been done of every stump remaining, the value of the timber so taken would in his estimation have been double the amount which he stated in his report filed March 8, 1912.

The main respondent testifying on his own behalf was not very definite as to the dates when the large timber had been removed, the stumps of which still remained. He did say, however, that some timber, in amount not definitely determined, had been removed by his direction during the latter months of the year 1910. There was also evidence from an adjoining land owner and from a laborer in the employ of the principal respondent that considerable amounts of timber were removed from said tract by direction of the main respondent during said latter months of 1910. The witness Hunter testified that he was unable to say from a wide experience what time would be necessary to cause by the action of the elements a rotting of stumps of trees of the character of those which had been removed from this tract. He did however say that from his experience he was able to state that no stump of any character, even of wood of the hardness of the large trees removed from this tract, could be exposed for any considerable number of years without showing signs of rot and disintegration. In his report he assessed the total damage inflicted by the removal of the trees from said tract at \$6,192.00 and stated both in his report and orally that this figure was very conservative. He stated further in his report that the complainant, who was present at the time the survey and assessment were made, requested him to reduce the amount which he had estimated by one third, which would be the sum of \$4,121.00. This

he did not recommend but simply stated that it was the request of the complainant.

Under such state of facts, the court is without any means of exact mathematical determination of which trees were removed by the respondents or their agents subsequent to the entering into the contract between the parties hereto, but with all the evidence before him, has reached the conclusion that without more definite testimony as to the date of the removal of the large trees, or of any trees, or of exact information as to what uses the timber so removed was put to or its value, the value of trees so removed from said wood land tract could be fairly assessed at the sum of four thousand dollars.

It is contended on behalf of the respondents that the word "usufruct" employed by the parties hereto in the contract between them as permissive to the respondents in relation to the use of the land before its conveyance to the complainant, in accordance with the terms of said contract, contemplated in law the use of the timber which was merchantable upon the wood land tract here considered.

The court is unable to reach the conclusion as matter of law that "usufruct" as employed in said contract was in contemplation of the parties hereto a practical removal from said tract of all merchantable timber, as the testimony of all the witnesses showed. The complainant testified, without contradiction, that the existence of a considerable amount of merchantable timber upon said tract was a moving inducement to him to enter into the contract with the respondents.

It is provided in Sec. 469 of the Civil Code of Porto Rico, in definition of the word "usufruct." :—

"SECTION 469. Usufruct is the right to enjoy a thing owned by another person, and to receive all the products, utilities and advantages produced thereby, under the obligation of preserving its form and substance, unless the deed constituting such usufruct or the law otherwise decree."

In the case of *Mulford vs. Le France*, 28 Cal., 88, Mr. Justice Sawyer, in construing a similar provision in the Spanish law as applicable to lands which one constituted a portion of the province of Mexico, and which lay within the territorial limits of the State of California, quotes (pp.

102-103) from Escriche as follows: "Usufruct—the right to use and enjoy the property of others; that is to appropriate its fruits without impairing the substance."

To the same effect is the holding in the case of *Heintzen vs. Binniger*, 79 Cal., p. 5. There is similar provision in the Civil Code of Louisiana, with the same definition, and indeed the cases seem to be unanimous to the effect that a usufruct does not include the right to materially change the status of the property while it is in an indeterminate situation with relation to the parties in any material way.

The English cases in relation to waste, and in definition of the word "usufruct," and particularly as applicable to standing timber, are uniform to the effect that, in the cases usually arising there, which are the removal by a tenant in possession of standing timber, and the application for an injunction by the person owning the reversion, a removal of merchantable timber, unless made necessary for the preservation of the rest of the timber, constitutes a waste and is not contemplated within the legal meaning of the word "usufruct."

The same principle has been decided by the Supreme Court of the United States in the case of *Hutchins et al. vs. King*, 1 Wall. p. 53. In this case there was growing timber upon real estate which was covered by a mortgage, and the mortgagor upon removing or attempting to remove growing timber from the land so mortgaged, was enjoined, the court holding by Mr. Justice Field as follows:

"Growing timber constitutes a portion of the realty and is embraced by a mortgage of the land. When it is severed from the freehold without the consent of the mortgagee, his right to hold it as a portion of his security is not impaired."

This seems to state with exactness the holding of the courts with relation, not only to lands which are covered by mortgage as in that case, but to lands which were in a manner outside the complete domination of either of the parties to this action until the contract had been concluded by performance.

In the petition of complainant for the assessment of waste, prayer is made that the decree of the court shall include also certain unpaid taxes upon the premises here in controversy, and a statement of the Treasurer of Porto Rico gives the

amount thereof for the fiscal year 1911-1912, with surcharges up to March 31, 1912, as being \$206.68. As complainant here has been in possession of the premises which are liable for said taxes, for a considerable time, the court will divide the same and authorize the complainant to retain from the purchase price to be paid, the sum of \$103.44 on account of said taxes and surcharges.

In making payments to the respondents, upon a receipt of a conveyance, the complainant will therefore be authorized to retain from the consideration to be by him paid for said conveyance the sum of \$4,000.00 in repayment for waste committed by the respondents or their agents upon the tracts of wood land here under consideration, and \$103.34 on account of taxes and surcharges, and it is so ordered.

To which action of the court, counsel for the respondents duly object and except.

(Signed)

PAUL CHARLTON, *Judge*.

UNITED STATES OF AMERICA,

District of Porto Rico, ss:

I, Rafael Guillermet, clerk of the District Court of the United States for Porto Rico do hereby certify that the foregoing is a true and correct copy of the Original *Opinion* in the above entitled cause as the same appears on file and of record in my office under date of March 30th, 1912.

Witness my official signature and the seal of said court, at San Juan, in said district, this 26th day of June, A. D. 1912, and in the 136th year of the Independence of the United States of America.

Attest:

[Seal United States District Court for the District
of Porto Rico.]

RAFAEL GUILLERMET, *Clerk*,

By L. A. GOSS, *Deputy*.

[Endorsed:] No. 672. Equity. In the District Court of the United States for Porto Rico. Robert Graham *vs.* Rafael Gutierrez del Arroyo *et al.* Opinion.

"EXHIBIT D."**TRANSLATION.****TOTAL RELEASE AND CANCELLATION OF MORTGAGE No. 45.**

In the city of San Juan, capital of Porto Rico, July 5, 1912, before me, Frank Antonsanti Capo, notary public, with residence in Porto Rico, and office on the upper floor of the American Colonial Bank building, appears Don Rafael Guillermetty Rosales, thirty-two years of age, married, and resident of San Juan, lawyer, and clerk of the District Court of the United States for Porto Rico, who appears herein in that character, pursuant to decree of the Honorable Paul Charlton, judge of said court, dated June 13th of the present year, by reason of the refusal of Don Rafael and Doña Dolores Gutierrez del Arroyo.

I personally know the said Guillermetty who has, according to my judgment, the necessary legal capacity to execute this document of total release and cancellation of mortgage.

Mr. Guillermetty declares:

First. That by deed executed July 6, 1911, being No. 45 of the protocol of the undersigned notary, the said Guillermetty in his capacity as clerk of the District Court of the United States for Porto Rico, and because of the refusal of the defendants Don Rafael and Doña Dolores Gutierrez del Arroyo, made a judicial sale of three parcels of land to Mr. Robert Graham, fifty-four years of age, agriculturist, resident of Bayamón, and married to Mrs. May Wood Graham. Further, that the purchaser paid part of the purchase price upon receiving the deed, in accordance with agreement which had been made between Mr. Graham and Mr. Gutierrez del Arroyo, there remaining due and payable the sum of \$12,248.50 in order to pay the total price within the term of two years of the date of such deed, it being understood that the debtor could pay the price of

the property any time within two years without paying interest of any amount on the deferred sum, but with the condition that Sr. Gutierrez del Arroyo should remain in possession of the property, composed of 222 acres and 75/100, until Mr. Graham should pay the said amount.

Second. That in order to guarantee the deferred payments, to wit, \$12,248.50, Mr. Robert Graham and his wife created a mortgage in favor of Don Rafael and Doña Dolores Gutierrez del Arroyo upon the property described as follows:

C. A parcel of land situated in the barrio of Pueblo Viejo, municipality of Bayamón, composed of two hundred and twenty-two and seventy-five hundredths acres, equivalent to 90 hectareas 85 areas and 82 centiareas of land, bounded on the north by the American Railroad and the main highway; on the east by the estate San Patricio of Francisco Cerecedo, separated by the brook Barraco; on the south by lands of the Southern Cross Fruit Company, and on the west by lands belonging to the Sucesion Gutierrez del Arroyo, a small portion bounding on the brook Margarita and the main highway of the town.

Third. That said sale and mortgage was inscribed in the Registry of Property of San Juan, section second, on page 230, volume 38, finca No. 1936.

Fourth. That the sellers Gutierrez del Arroyo remained in possession and usufruct of the rural property hereinbefore described, but, having caused waste therein, which reduced its value, the said Gutierrez del Arroyo was, upon the complaint of Mr. Graham, obliged by the District Court of the United States to pay \$4,000.00, as appears by the judgment rendered March 30th of the present year.

Furthermore, the purchaser, Mr. Graham, incurred other expenses, as, for instance, \$38.50 in internal revenue stamps for the inscription of the deeds in the registry of property, \$103.33 for taxes, and \$175.65 for costs growing out of the suit, which all together make a total of \$4,317.49.

Fifth. In virtue of the foregoing Mr. Robert Graham has obtained from the District Court of the United States for

Porto Rico an order to collect and discount from the deferred price the said sum of \$4,317.49, and he having offered to pay the rest of the deferred price thus cancelling the said mortgage, the undersigned Guillermet, in the capacity hereinabove described executes this release and receipt in full in favor of Mr. Robert Graham, who has, in his presence, paid \$7,931.01 as part of the deferred purchase price, the said Graham having delivered into the registry of the said Federal court the said sum for the benefit and disposition of the said Rafael and Dolores Guierrez del Arroyo, and the rest of the price, to wit, \$4,317.49, is retained by Mr. Graham to satisfy the waste and expenses caused by the sellers.

In virtue of this payment there is declared satisfied and performed the deed of July 6, 1911, and the obligations therein are hereby extinguished, and consequently the inscription thereof may be totally cancelled in the registry of property.

This is the deed of the undersigned Guillermet, executed in the presence of the following witnesses, who are of legal age and without impediment, namely, N. B. K. Pettingill and Jorge V. Dominguez, residents of this city.

The foregoing document having been read by the said Guillermet and the said witnesses, they found the same correct, and the said Guillermet ratified its contents and signed it together with said witnesses, to all of which, and to the acquaintance with said Guillermet, as well as of his personal conditions, and all that is set forth in this public document, I, the undersigned notary certify and give faith.

(Signed)

RAFAEL GUILLERMET.

N. B. K. PETTINGILL.

JORGE V. DOMINGUEZ.

(Signed and sealed.)

FRANK ANTONSANTI.

The foregoing is a faithful and exact second copy of the original of which it purports to be a copy, and which exists under No. 45 in my present protocol as notary. At the request of Don Gabriel Guerra I issue this copy in one fold

of paper of my special use, and written in type, which copy
I sign and seal the 19th day of November, 1912

[Seal of Notary.]

(Signed)

FRANK ANTONSANTI.

Translation satisfactory.

N. B. K. PETTINGILL,
Counsel for Robt. Graham.

19733]

STATEMENT OF THE CASE.

This is an appeal from a decree rendered in the District Court of the United States for Porto Rico, May 18, 1910, upon a bill of complaint for the specific performance of an alleged contract of sale of three parcels of land belonging to appellants, forming a part of a larger tract in the municipality of Bayamón, Porto Rico. The bill was filed October 18, 1909. As amended February 23, 1910, it alleges the execution of an agreement between appellants and appellee, on the fifth day of July, 1906, which said agreement as set forth in the Findings of Fact of the Court below (paragraph 1) is as follows:

MEMORANDUM.

In the city of San Juan, Porto Rico, the 5th day of July, 1906, Don Rafael Gutierrez del Arroyo and Mr. Robert Graham agreed: 1st. Don Rafael Gutierrez del Arroyo compromised himself to sell to Mr. Robert Graham a parcel of his estate in Pueblo Viejo, which both parties have already fixed the boundaries of and which may extend up to 70 or 75 cuerdas, at the price of \$40.00 per cuerda. 2nd, he also compromised himself to sell to him another small extension of land, which they also fixed the boundaries of, and which may have an extension, approximately, of 14 cuerdas, at the price of \$50.00 per cuerda. 3rd, he also compromised himself to sell to him the other 200 or 300 cuerdas of the same estate, in that part of which, which they have also already designated, at the price of \$55.00 per cuerda. 4th, the parcels indicated in Nos. 1 and 2 shall be paid in cash. The parcel indicated in the 3rd number shall be paid in installments during the two years following the delivery of the document. Mr. Graham shall not pay any interest for the extended time of payment; but Mr. Arroyo shall remain in possession and usufruct of the part of the estate sold and not paid for until the payment shall be made. Mr. Graham shall execute a mortgage on the estate to secure the

payment. 5th, this contract shall be extended in a public document as soon as Mr. Graham will have ultimated the deal which is now pending with Doña Felicia Fernández about the purchase of an undivided part in the same estate. In case that deal should not be carried to effect, this contract will also remain without virtue and effect. 6th, this contract is also subjected to the condition that Don Rafael Gutierrez del Arroyo could rescind the contract of lease which he now has with Don Eleuterio Landrau.

(Signed) *Robert Graham.*

Rafael Gutierrez del Arroyo.

In said bill of complaint it is alleged that on the 27th day of April, 1908, appellants and appellee modified the foregoing agreement. This modification is set forth in the following extracts from the Findings of Fact of the Court below.

Finding of Fact No. II.

That subsequent thereto, to wit: on the 27th of April 1908, the following agreement was made between the same parties, to wit:

On the 27th of April 1908, the contracting parties make addition to the third clause of this contract in the sense that the excess of price which Mr. Graham may obtain over the \$55.00 per cuerda shall be divided between him and Mr. Arroyo at 50 per cent each.

(Signed) *Robert Graham.*

Rafael Gutierrez del Arroyo.

Finding of Fact V.

That the following correspondence at various dates was had between the complainant Graham and the respondent Rafael Gutierrez del Arroyo: First a letter from Mr. Graham to said Arroyo (marked defendant's exhibit B) which reads as follows:

Second. A letter (complainant's exhibit B) which reads as follows:

San Juan, P. R., April 27th, 1908.

Mr. Robert Graham, Present.

My Dear Sir: In my own name and in that of my sister, Doña Dolores, I authorize you to sell, in accordance with conditions agreed, the part of our finca at Pueblo Viejo, which is bounded on the east between Mr. Wilson and Don Fco Cerecedo and which other boundaries are agreed with you.

I can not state with certainty the extension of this part of the finca, which must be from two hundred to three hundred cuerdas.

I must explain that as a lease contract of the finca is still pending, I can not undertake to deliver same until the expiration of that contract, which will take place within one year. This is no obstacle to the present realization of the sale, the delivery of the thing sold being subject to the fulfillment of the lease contract.

Yours truly,

(Signed) Rafael G. R. del Arroyo.

The bill further alleges that on the ---- day of September, 1909, appellee tendered to appellants three thousand dollars (\$3,000) in payment of one of the tracts of land, to wit: the parcel consisting of seventy to seventy-five acres, more or less, and which is described in the contract of July 5, 1906, and avers that appellants declined to accept said money or to execute said contract. The finding of the court with respect to this alleged tender does not support this allegation of the bill however, as it discloses that no legal tender was in fact made, but only an offer to purchase all of the tracts of land included in the agreement of July, 1906. This is set forth in the fifth Finding of Fact as follows:

Third. A letter (complainant's exhibit C) which reads as follows:

San Juan, P. R., Sept. 1, 1909.

Mr. Rafael Gutierrez del Arroyo, Bayamón, P. R.

Sir: The object of this letter is to formally offer you to pur-

chose the parcel of land of 70 or 75 cuerdas at the rate of \$40 per cuerda and another parcel of 14 cuerdas at the rate of \$50 per cuerda, and that portion of another parcel of 200 or 300 cuerdas bounding with the American Railroad Company on the North, and with the lands of Francisco Ceroedo on the northeast and east. Said portion of said parcel being the 100 cuerdas lying nearer to the railroad line referred to at the rate of \$55 per cuerda. All of which is mentioned and described in the contract subscribed by yourself and the undersigned in the city of San Juan, Porto Rico, on the 5th of July, 1906. And I hereby offer to pay you the full amount which the value of the different parcels of land mentioned represent, at the particular price fixed in each case.

Yours truly,

(Signed) *Robert Graham.*

P. S.—It being understood that the said parcels of land shall be measured and the payment thereof shall be based upon said measure, it being also understood that I offer you in this act the amount represented by the value of each parcel based on an estimate of the maximum number of cuerdas mentioned in the contract of sale signed by us on the 5th of July, 1906.

Very

Robert Graham.

See also Finding of Fact XIII which is as follows:

That some time before bringing this suit, Mr. Graham offered to the respondents Gutierrez, the sum of three thousand (\$3,000) dollars in payment for the two smaller parcels, but did not, at the same time, offer the transfer to them of the undivided share in the ownership of the land which he acquired from Felicia Fernandez, nor did the said Rafael Gutierrez del Arroyo at that time make demand for the same.

The bill of complaint avers:

That the said Rafael Gutierrez del Arroyo, acting for himself and his said sister Doña Dolores Gutierrez del Arroyo,

now refuses to execute said contract, or any part thereof, and declares that he and the said sister will not execute the same and as a reason therefor, avers that the said contract is no longer of any binding force or effect upon said defendants; but your orator will submit for the consideration of your Honor a translated copy of said contract, at the trial of this cause, and further submit whether or not the same is a valid contract, as your orator is informed and verily believes the same to be; and your orator further says that he is informed and believes that the said contract is in full force and effect, and that he may of right ask that defendants be required to execute the same, all as they promised and agreed to do. Your orator further says, that acting upon the strength of said agreement, and having full faith in the execution of the same on the part of defendants, he has considered himself as having an interest in said property, and has expended considerable sums of money in defending the same, and in costs affecting said property in motions pending in this court, in procuring contracts relative to the same, and he did in fact, as a portion of the consideration for the right to purchase or sell said lands, at the earnest solicitation of said Rafael Gutierrez Arroyo, purchase the interest in said property of Miss Petelia Fernandez, paying therefor the sum of eight hundred dollars (\$800), and is now the owner of said interest, and in so shaping his property interests generally, that he might be able to purchase the same as by the terms of said contract he agreed to do, and your orator says that his losses and expenses in the manner and form referred to and as hereinafter appears amounts approximately to the following sum, to wit: Twenty-five thousand dollars.

The bill further recites that defendant Francisco Robledo

Claims to have some sort or kind of interest in said estate antagonistic to the rights of your orator in the premises, the exact nature of which your orator believes to be a lease of certain of said premises to said Robledo from said Gutierrez; but your orator further says that the said lease was made by said Robledo with a full knowledge of your orator's rights in

the premises, and because thereof your orator submits that any interest, claim or right, or pretended claim or right held by said Robledo ought to be subjected to the rights of your orator in the premises.

With respect to this allegation of the existence of a lease in favor of defendant Robledo, the forth Finding of Fact which sets forth said lease literally discloses that on the 10th day of June, 1909, appellant executed to defendant Robledo a lease of the entire tract for a period of six years from the first day of July, 1909, "which term may extend, at the will of the lessee, for two additional years provided that he shall notify the lessor six months prior to the expiration of the lease of his intention to so extend the said lease."

The prayer of the bill of complaint was that

That the defendants may be decreed to execute and deliver to your orator good and sufficient deeds of transfer to the property in this bill of complaint described, all in accordance with the terms and conditions of said contract; provided the said complainant shall within the period of thirty days from the filing of said decree deliver to defendants in good and lawful money of the United States, the sum total of the prices agreed upon as the same are stated in said contract, and provided further that in decreeing the specific performance of said contract the said decree shall further provide that in the event your orator shall fail to pay the said sums of money as specified in said contract, that then, and in that event, the said contract may stand as cancelled and of no further force and effect as between your orator and the defendants Rafael Gutierrez del Arroyo, and his sister Doña Dolores Gutierrez del Arroyo.

The bill further prayed that defendant Robledo be enjoined from interfering with the execution of the said agreement, and that an injunction be issued restraining him from interfering in any manner with the property in question.

Finding of Fact VI of the Court is as follows:

That the complainant Mr. Graham has obtained the title to the undivided part of the property in litigation from the co-owner of it, one Felicia Fernandez, in consideration of the sum of eight hundred dollars, which sum was duly paid by said Graham.

The court below, in Finding of Fact III, found that on the 10th day of August, 1909, there was executed by due notarial document a lease by appellants to appellee of the two smaller parcels of land which were described in, and were the object of the agreement of July 5, 1906. This lease is set forth verbatim in said Finding of Fact.

Among the clauses therein contained are the following:

1. That the parties hereto, Don Rafael Gutierrez del Arroyo, his sister of the surname and Mr. Robert Graham, are co-owners of the following described property: Farm called Pueblo Viejo Arriba, situated in the barrio of Pueblo Viejo, in the District of Bayamón, bounded on the north by Don Manuel Diaz Coneja and Cerecedo Brothers and Co.; on the east by the same Cerecedo Brothers and Co. and Aquilino Power formerly, now the succession of Don Gerónimo Landrau, Don Manuel Kortado and Don Ulfes García Salgado, now Don Rafael Ortiz, on the south by the succession of Don Julio O'Neill, Don Francisco García, and Don José Jesús Pesquera, and on the west the Farm Montes, Mauricio de los Santos and Modesto Ortiz de Tejada.

2. That it ---- not yet registered at the Registry of Property and that the interest which Don Rafael Gutierrez del Arroyo owns therein was acquired by him, part by inheritance and part by purchase from other parties in interest; that the interest owned by Doña Dolores Gutierrez del Arroyo, was acquired by her by inheritance from her father and the interest owned by Mr. Graham was acquired by him by purchase from Doña Felicia Fernandez.

3. That said property with the exception of certain parcels of 57 and 13 cuerdas lying west thereof, which are the object of this contract and the boundaries of which are very well

known to the contracting parties is held under lease by Don Francisco Robledo.

4. That the Gutierrez del Arroyo Brothers, have agreed to lease to Mr. Graham, the said parcels of land in said property, that is, of 57 and 13 cuerdas, and to that effect they have covenanted as follows:

First. Don Rafael Gutierrez del Arroyo in his own right and by virtue of the power granted him, does hereby make lease unto the other party hereto Mr. Robert Graham, of two parcels of land in the above described property, one of 57 cuerdas and the other of 13 cuerdas which parcels of land are known to both parties and they have been well defined.

Second. The lease shall be for the term of three years from this date and therefore it shall expire on the same day and month of the year 1912.

Third. The amount of the lease or rent shall be \$165 for the first year and \$217.50 the rest, to be paid in quarterly installments due.

Fourth. The actual taxes levied upon the parcels of land under lease shall be paid by the owners in proportion to their respective interests, but should any increase be made thereon, the excess shall be paid by the lessee Mr. Graham.

Fifth. The actual improvements on the parcels of land leased shall remain to the benefit of the owners thereof upon the expiration of the lease.

Sixth. Inasmuch as each contracting parties allege certain rights which are contradicted by the other, emanating from previous transactions, which might affect this lease, the parties hereto agree that this contract does not, make better or worse nor modify the value, scope and existence of such rights.

The answer of appellants Rafael and Dolores Gutierrez del Arroyo, defendants below, admitted the execution of the agreement of July 5, 1909, but contended, in effect, that it was an option in favor of appellee to purchase the lands therein described upon compliance with conditions therein imposed, and that, because of the failure of appellee to comply with such conditions within the period of two years, which must be interpreted as the period for the consumma-

tion of the option, the latter became ineffective.

They further allege that appellee, by various subsequent acts and agreements, voluntarily changed the character of the said contract of option to one of commission or agency.

They allege that appellee had no right, under the circumstances, to demand a sale or transfer to him of the properties in question in accordance with the original agreement of July, 1906.

Defendant Robledo sets up in his behalf his rights as lessee under and by virtue of the lease hereinbefore referred to executed by appellants in his favor on the 10th day of June, 1900, expiring on the 30th day of June, 1915.

For the purposes of the principal issues in this case as they affect the appellants Rafael and Dolores Gutierrez del Arroyo we do not consider it material to lay special stress upon the rights or claims of appellant Robledo.

SPECIFICATION OF ERRORS.

In the court below, and in accordance with law, the appellants, as preliminary to their appeal, filed the following:

Assignment of Errors.

Now come the respondents and file the following Assignment of Errors upon which they and each of them will rely:

First. That the United States District Court of Porto Rico erred in holding that the contract between the complainant Graham and respondents Gutierrez del Arroyo was a deed of sale and not a contract of an option sale.

Second. That the court erred in not holding that a reasonable time has passed for the complainant to make use of such option, and that he, within that reasonable time, did not do so.

Third. That the court erred in not holding that the complainant, by his conduct, to wit: By entering into a contract of lease with the said respondents for the parcels which he claims to have been sold to him, has waived his right of purchase as against the respondents concerning said parcels so leased by him.

Fourth. That the court erred in holding that the respondent

Francisco Robledo, who for valuable consideration and in good faith has made a contract of lease with the other two respondents, can be deprived of his rights acquired by such lease.

Fifth. That the court erred in not holding that a reasonable compensation, for his work and labor and expenses had in behalf of the premises leased by the said Robledo from the other respondents, shall be rendered to him by the complainant.

Sixth. That the court erred in entering a final decree therein in favor of the complainant and against the respondents, Rafael and Dolores Gutierrez del Arroyo.

Seventh. That the court erred in entering a final decree therein in favor of the said complainant against the respondent Francisco Robledo.

Eighth. That the court erred in not dismissing the said suit and entering a final decree therein in favor of the respondents.

Appellants contend that the error of the decree which was entered by the court below consisted in giving to the option contract (*promesa de venta*) the effect of an absolute sale as recognized by section 1353 of the Civil Code of Porto Rico, and in decreeing that such absolute contract of sale was binding upon appellants and in force at the time of the institution of the suit herein.

Appellants further contend that the court erred in failing to attribute to the modification of the said option contract of 1906 made by the subsequent agreement of April 27, 1908, what in fact and law the latter was; namely, a simple agency or commission (*mandato*) as recognized by the civil law in force in Porto Rico, which agency or *mandato* was revocable at the will of appellants.

Appellants further contend that the court below erred in its decree in not giving due effect to the admissions made by appellee in taking from appellants a lease of a portion of the land in question and in accepting such lease subject to the lease in favor of appellant Robledo with respect to the other portions of the property.

It is further contended by appellants that the decree was erroneous in annulling the lease in favor of appellant Robledo.

APPELLANT'S BRIEF AND ARGUMENT.

Simply stated, the contention of the brief and argument of appellants rests upon the proposition that the court below by its decree failed to appreciate the true character of the agreement between the parties as they were and must be determined in the light of the civil law which prevails in Porto Rico.

Neither in the opinion nor decree of the court can be found a reference to a single principle of the civil law applicable to the transactions between the parties. There is not even a citation nor a hint of any supposed principle of the equity which is administered as a part of remedies afforded by and recognized in United States courts.

Appellants contend:

I.

THE AGREEMENT OF JULY 5, 1906, WAS, UNDER THE CIVIL LAW IN FORCE IN PORTO RICO, BUT AN OPTION TO PURCHASE (PROMESA DE VENTA).

II.

THE MODIFICATION OF THE OPTION CONTRACT (PROMESA DE VENTA) OF JULY 5, 1906, AS MADE BY THE AGREEMENT OF APRIL 27, 1908, CONVERTED SUCH OPTION TO PURCHASE INTO AN AGENCY, COMMISSION, OR POWER (MANDATO) TO SELL, WHICH AGENCY, COMMISSION, OR POWER WAS, UNDER THE LAW, REVOCABLE AT THE PLEASURE OF APPELLANTS.

III.

THE CONDUCT AND ACTS OF APPELLEE SUBSEQUENT TO THE EXECUTION OF THE OPTION OF JULY 5, 1906, CONSTITUTE AN ADMISSION UNDER THE PART OF APPELLEE OF THE CONTENTION OF APPELLANTS, AND CREATE AN ESTOPPEL AGAINST HIM.

POINTS UNDER I.

Contract of July 5, 1906 (*promesa de venta*) is recognized by Section 1354 of the Revised Civil Code of Porto Rico, which was in force at the time of the execution thereof, and which provides:

A promise to sell or buy (*promesa de vender ó comprar*) there being an agreement as to the thing and price, gives a right to the contracting parties to mutually demand the fulfillment of the contract.

Whenever the promise to purchase and sell can not be fulfilled the provisions relating to obligations and contracts of this book shall be observed by the vendor and by the vendee, as the case may be.

This section appears under Title IV, Contract of Purchase and Sale, and under Chapter I, Nature and Form of this Contract.

Whilst the Code employed the term *promesa de venta*, the Spanish jurisprudence growing out of the Civil Code recognizes the term *opción* or option which has the same characteristic as recognized by American law.

Appellants contend that in the option agreement of July, 1906, the agreement as to the "thing and price" contain[ed] as an essential part of the transaction and "thing" a definition and limitation of the time in which the option was to be exercised by Graham. At the outset it becomes necessary to interpret this option contract in respect to the duration or term thereof. The court below in its decree erroneously gave to it the interpretation that the option could be exercised by Graham not only within two years thereafter, but as late as October 18, 1909, when the bill was filed, or May 18, 1910, when the final decree was rendered.

Appellants insist that the only proper interpretation of this option contract is that Graham should consummate it within two years from the date thereof;

(a) With respect to the two small tracts by immediate payment in full in cash;

(b) With respect to the large parcel described in Paragraph III by payment in two equal annual installments beginning

from the date of such contract.

Whilst the option provided that Graham should not pay any interest on the installments and that appellants should remain in possession and usufruct of the large part of the property until the installments should be paid, it was also provided that Graham should execute a mortgage on this property to secure such installments.

Appellants contend that the consummation of this option could take place only by the performance by Graham of the following conditions:

First. By paying cash immediately for the two small portions of land.

Second. By Graham's placing himself in a position to make a proper conveyance to appellants of the undivided interest of Feticia Fernandez within the said two years.

Third. With respect to the large parcel described in the third paragraph of the option, Graham should obtain a deed therefor within the two years from the date of such contract, and should execute a mortgage in favor of appellants to secure to them the two installments which were to be paid within the said two years as the purchase price therefor.

The condition of the option with reference to the rescission of the lease in favor Landrau is not considered by appellants as material to the issues herein.

Appellants contend that the period of two years fixed in the option was an essential feature or condition of the obligation; it was the "determinate cause" specified in Section 1067 of the Civil Code of Porto Rico which will hereinafter be referred to.

Two years having elapsed without compliance upon the part of Graham of the conditions, the option, by force of its terms and by operation of law, expired. If the option contract of 1906 had the effect which was given to it by the court below of continuing indefinitely in favor of Graham the right to purchase the property in question without any penalty upon his part for failure to exercise such option, then it was but a unilateral compromise.

In this connection we call attention to the decision of the Su-

preme Court of Spain of October 2, 1885, in which there is clearly distinguished in option contracts of this character the execution of the contract and its consummation or performance—the latter not taking place until there has been respectively delivered the thing sold and the price therefor.

The option contract of 1906 was a *pacto de ley comisorla*, an agreement between the vendor and vendee that if the latter shall fail within the time limited in the contract to pay for the thing sold the option or *promesa de venta* expires.

See Scaevola's Commentaries on the Civil Code of Spain, Vol. 23, page 307, and following.

See Manresa's Commentaries on the Civil Code of Spain, Vol. 10, page 83, and following.

In an option contract (*promesa de venta*) it is not necessary to ask for and obtain the rescission of the contract, since from its very character, *ipso facto* ceases to be of effect by the purchaser defaulting in the performance of the conditions thereof.

Decision of the Supreme Court of Spain, Nov. 12, 1898.

The second paragraph of Section 1354 of the Code, which is the subject of this point, refers to impossibility of performance, as, for instance, in the case of the thing sold not belonging to the vendor, or its having disappeared, the inability of the vendee to deliver the price agreed upon, and the physical, moral, or legal impossibility of carrying out the contract.

Scaevola's Commentaries on the Civil Code of Spain, Vol. 23, page 333.

Obligation of the Vendee.

Section 1403, Civil Code of Porto Rico.

The vendee is obliged to pay the thing sold at the time and place stipulated in the contract.

If the time and place should not have been fixed, the payment must be made at the time and place where the thing sold is delivered.

Obligations of the Vendor.

The vendor shall not be bound to deliver the thing sold if the vendee should not have paid the price or if the period for the payment has not been fixed in the contract.

Article 1369 Civil Code.

Nature and Effects of the Obligation.

Persons obliged to deliver or to do something are in default from the moment when the creditor demands the fulfillment of their obligation, judicially or extra-judicially.

However, the demand of the creditor, in order that default may exist, shall not be necessary—

1. If the obligation or law declares it expressly.
2. If by reason of its nature and circumstances it may appear that the fixing of the period within which the thing was to be delivered or the service rendered was a determinate cause to constitute the obligation.

Section 1067, Civil Code of Porto Rico.

As has been pointed out above, the period of time fixed in the option of July 5, 1906, was an essential condition of the contract; it was a "determinate cause" or motive for the constitution of the obligation.

Counsel for appellee may seek to apply to this case Section 1407 of the Civil Code of Porto Rico, which provides:

In the sale of real property, even though it may have been stipulated that in the absence of the payment of the price within the time agreed upon, the rescission of the contract shall take place by full right, the vendee may pay, even after the expiration of the period, as long as he has not been summoned either judicially or by a notarial act. After the suit has been instituted the judge can not grant him a further period.

This section of the Porto Rico Code is identical with Section 1504 of the Spanish Civil Code.

The Supreme Court of Spain has held that this section does not apply to option contracts (*promesa de venta*) which are recognized by Section 1451 of the Spanish Civil Code which is the same as Section 1354 of the Porto Rican Civil Code.

In the decision of the Supreme Court of Spain of October 7, 1896, the doctrine is established with respect to the option contract (*promesa de cesión*) executed under the provisions of Article 1451 of the Spanish Code (1354 of the Porto Rican Civil Code). That the provisions of Article 1504 of the Spanish Civil Code (Section 1407 of the Code of Porto Rico) do not apply.

In further support of the proposition that appellants were not obliged to make a judicial or non-judicial demand upon Graham we cite the decision of the Supreme Court of Madrid, of November 12, 1908:

In an option contract (*promesa de venta*) it is not necessary to ask for and obtain the rescission of the contract, since this from its very character, *ipso facto* ceases to be of effect by the purchaser defaulting in the performance of the condition there of.

In addition to the failure of appellee to pay the price in the manner and within the time, fixed by the option contract, he also failed to make a valid tender to appellants, within such time, of the undivided interest acquired by him from Felicia Fernandez.

See Finding of Fact XIII.

WITH REFERENCE TO POINT II.

The modification of the option contract of July 5, 1906, by the agreement made April 27, 1908, converted such option to purchase into an agency, commission, or power (*mandato*) to sell—which agency, commission, or power (*mandato*) was, under the law of Porto Rico, revocable at the pleasure of appellants.

From the second Finding of Fact by the court below it is apparent that by the agreement and modification of April 27, 1908, the parties radically changed the character of the original agreement

of an option in favor of Mr. Graham to purchase, substituting in place thereof a commission or power for the latter to sell to other parties. This is made all the more apparent by a letter addressed by appellants to appellee on the same date in which the former "authorizes" appellee to sell.

----- Our finca Pueblo Viejo.

This is the same property described in the third paragraph of the original option agreement, as appears from the further statement in the letter of April 27, 1908, to the effect that "I can not tell with certainty the extension of this part of the finca which must be from 200 to 300 cuerdas."

Furthermore, the other statements contained in this letter are absolutely negative and make inconsistent the idea of the existence at that time of even a right upon the part of Graham to purchase under the original option.

I must explain that as a lease contract of the finca is still pending, I can not undertake to deliver same until the expiration of that contract, which will take place within one year. This is no obstacle to the present realization of the sale, the delivery of the thing sold being subject to the fulfillment of the lease contract.

By the acts of the parties, and particularly by the agreement of April 27, 1908, the original option was abandoned by Graham, or rather, he recognized his inability to perform the conditions thereof, and he accepted the commission or agency to sell the property in question.

The following sections of the Civil Code of Porto Rico are applicable:

Section 1611. By the contract of agency (*contrato de mandato*) a person binds himself to render some service, or to do something for the account or at the request of another.

Section 1634. Agency is terminated—

1. By revocation.

2. By withdrawal of the agent.

3. By death, interdiction, bankruptcy, or insolvency of the principal or of the agent.

Section 1635. The principal may, at his will, revoke the power and compel the agent to return the instrument containing the same in which the authority was given.

It does not appear from the Findings of the Court below that Appellee Graham exercised this agency or power of sale as it was contained in and governed by the agreement of April 27, 1908, or that any obligations were assumed by him thereby.

The twelfth Finding of Fact finds that the said contract of purchase was by said Graham transferred to the Graham and Granger Company of which Graham is a member, without profit to Graham; that is to say, that said agreement to purchase was transferred at the prices fixed therein for said land.

The "contract of purchase" referred to in this finding is identified by the preceding Finding No. 10 to be "the contract of the 5th of July, 1906, between Robert Graham and Rafael and Dolores Gutierrez del Arroyo."

The Supreme Court of Spain, passing upon the rights of parties arising out of option contracts executed in accordance with Section 1451 of the Spanish Civil Code (1354 of the Civil Code of Porto Rico) has held that option contracts executed in accordance with said section can, like all other contracts, be modified by the mutual consent of the contracting parties, although such modification should be in conflict with the original contract, since the original contract is understood to be novated or substituted by the latter agreement.

See Decision of the Supreme Court of Spain, October 11, 1899.

WITH RESPECT TO POINT III.

By accepting from appellants the lease of August 10, 1908, appellee made an incontestable admission of his abandonment of, or default in the option contract of July, 1906.

These facts show conclusively the elementary principle of estoppel

which must be held to be binding upon appellee and to be sufficient to have been a legal barrier to the court below to enforcing the original option contract.

Appellants respectfully pray for a reversal of the decree of the Court below.

FRANCIS H. DEXTER,

Attorney for Appellants.